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A TREATISE

ON THE

LAW OF THE DOMESTIC RELATIONS;

EMBRACING

HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT.

BY

JAMES SCHOULER,

AUTHOR OF TREATISES ON "THE LAW OF PERSONAL PROPERTY," "BAILMENTS, INCLUDING CARRIERS," ETC.

THIRD EDITION.

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PREFACE TO THE THIRD EDITION.

THE present work has been eighteen months out of print; but the author trusts that the improvements here introduced will compensate for the delay of this new edition.

Every part of the work has been personally revised by the author. The cases reported in England and the United States since the previous edition have been incorporated with the text or foot-notes; many of the decisions here cited having been published during the current year, and while these sheets were passing through the printer's hands. Following the late custom, the author has also divided his materials by sections, inserting head-lines for the convenience of the reader. The text is still kept within the compass of a single volume; but "Husband and Wife," which is here somewhat abridged, will be found treated by the author at length in a special volume, devoted to that subject, which his publishers issued a few months ago.

J. S.

BOSTON, July 30, 1882.

PREFACE TO THE FIRST EDITION.

THE purpose of the writer, in the present treatise, is to furnish a clear, accurate, and comprehensive analysis of the law of the domestic relations, as administered in England and the United States at the present day.

To accomplish this purpose, and at the same time not to transcend the limits of a single volume, was not easy. It became necessary to treat of principles rather than details, and to avoid matters of local practice altogether. A few topics, such as curtesy and dower, which are fully discussed in other treatises, have been for the same reason touched upon lightly, and the work, on the whole, made elementary in its method of treatment, though at the same time practical. The lawyer who misses elaborate head-notes and subdivisions will yet find assistance in a full index and table of contents: and what has been lost in this respect is gained in subject-matter. Especial pains have been taken to present in this work such topics, pertaining to the general subject, as were not easily accessible elsewhere.

The writer has freely consulted the valuable law libraries of the Suffolk Bar, at Boston, and of Congress, at Washington, — the latter being the most extensive in this country. Among works which have afforded him the greatest assistance are Macqueen on Husband and Wife, Peachey on Marriage Settlements, Macpherson on Infancy, and Smith on Master and Servant, — treatises of acknowledged merit in England, though little known in the United States. Other books, more familiar,

which need not be enumerated at length, furnished valuable material in certain parts of this work, as the foot-notes sufficiently indicate. The writer deems it just to himself to add that the time-honored treatise of Judge Reeve has been found of little service, the radical changes of the last fifty years rendering new labor, new materials, and a new plan of treatment absolutely essential to meet the growing wants of the age.

If, on the whole, the present work is found to answer its purpose, in the judgment of his professional brethren, the writer will cheerfully acknowledge such errors and blemishes as the judicious critic may kindly point out.

JAMES SCHOULER.

Washington, D. C., April 30, 1870.

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THE DOMESTIC RELATIONS.

THE DOMESTIC RELATIONS.

PART I.

INTRODUCTORY CHAPTER.

§ 1. **Domestic Relations defined; Earlier Writers.** — The law of the domestic relations is the law of the household or family, as distinguished from that of individuals in the external concerns of life. Five leading topics are embraced under this head: *First*, husband and wife. *Second*, parent and child. *Third*, guardian and ward. *Fourth*, infancy. *Fifth*, master and servant. These will be successively considered in the present treatise.

Our general rule of classification is borrowed from Kent.[1] But other writers on the domestic relations have analyzed their subject differently. Blackstone omits infancy as a topic distinct from parent and child, and hence makes but four divisions.[2] The same is true of Reeve.[3] Such a method of treatment answered the purpose of these writers sufficiently; but since their day the topic of guardian and ward has grown into importance, giving occasion to the discussion of many principles which apply as well to parent and child, for which reason it is found better to draw off from both what is peculiar to neither, and make the new heading of infancy. Bingham, on the other hand, wrote a treatise in which the only divisions observed were those of infancy and coverture.[4] This plan would be found defective for a work like the present;

[1] 2 Kent Com. Lec. 26–32.
[2] 1 Bl. Com. Lec. 14–17.
[3] Reeve's Dom. Rel.
[4] Bing. Inf. & Cov.

for, in the first place, the subject of master and servant must be ignored altogether; and, secondly, that of guardian and ward cannot receive the distinctive treatment it deserves. Besides, the very juxtaposition of two such words as "infancy" and "coverture" suggests a similitude neither flattering to woman, nor in accordance with the present law of husband and wife, as will fully appear hereafter. Fraser, who writes for readers of the civil, or rather the Scotch, law, while otherwise classifying like Blackstone, adds the relation of master and apprentice to that of master and servant,[1] in which respect his example is not to be imitated by common-law writers. Upon the whole, therefore, the rule of Kent seems to us the preferable one, as being concise, comprehensive, and well adapted to the present state of English and American law.

It is curious to notice that all of these writers — and there are none else of standard authority who profess to occupy the whole subject — plunge at once into the law of their leading topics with nothing by way of general introduction; nothing to indicate to the reader whither they propose leading him. Not one has attempted to draw the chart which shall determine his legal bearings. Nor is the definition of the term "domestic relations" to be found in the books above specified. Indeed were it not for the title-page of Reeve's work, and a few casual passages in Kent's Commentaries, where the same words occur, one might ask how the expression "domestic relations" crept into general use among lawyers. Blackstone uses the terms "private economical relations," and "relations in private life;" words which of themselves would seem to give a much wider scope to our subject.[2] But Blackstone at all times manifests a strong predilection for independent analysis, with special reference, moreover, to the arrangement of his course of lectures; and in this particular instance the context, as well as the classification, seems to show that

[1] Fras. Dom. Rel. (Scotch). 2 vols.

[2] 1 Bl. Com. Lec. 14. The writer had just finished discussing at length the rights and duties of persons as standing in the public relations of magistrates and people; and the word "private" marks the desired contrast.

"domestic relations" was the topic in his mind. Fraser's complete title is "personal and domestic relations." Notwithstanding all this it is certain that "domestic relations" is now the well-sanctioned title of that law which embraces the topics specified by us at the outset, as those who examine the digests of reported cases and the codes of our leading States can testify. To legal precision in this respect, Reeve certainly contributed not a little by the choice of a suitable title for his volume, so long the standard text-book for English and American students.

§ 2. **Plan of Classification, &c.** — Starting, then, with a definition simple, natural, and well adapted to the materials in hand, we next ask what are the proper limitations of our subject? what should a text-book on the English and American law of the domestic relations comprise? (1.) As to three of our topics, — husband and wife, parent and child, and infancy, — the question is easily answered. Their very names convey a distinct significance even to the mind of the unprofessional reader. Except it be in the meaning of the word "infancy," which the law applies to all persons not arrived at majority, but popular usage restricts to the period of helplessness, all intelligent persons agree in the general use of the terms we have employed. And so strong are the moral obligations which attend marriage and the training of offspring, so intimately blended with the welfare and happiness of mankind are the ties of wife and child, that scarcely any one grows up without some knowledge of the general principles of law applicable to these topics, and particularly of such of the rights and duties as concern the person rather than the property. For positive law but enforces the mandates of the law of nature, and develops rather than creates a system.

(2.) Yet even here it should be observed by the professional reader that the term "husband and wife" is acquiring at law a more limited and technical sense than formerly. The idea of marriage involves both the entrance into the relation and the relation itself; and akin to marriage celebration is the dissolution of marriage by divorce, or what we may term our

recognized legal exit from the relation. Hence marriage and divorce constitute an important topic by themselves; and we find treatises which profess to deal with these alone. Marriage and divorce, moreover, have in England pertained until quite recently to the peculiar jurisdiction of ecclesiastical courts, constituting what is termed an ecclesiastical law.[1] The rights and duties which grow out of the marriage relation, on the other hand, still remain for separate discussion: the consequence of the celebration; the effect of marriage upon the property of each; the personal status of the parties, — in short, what new legal responsibilities are assumed, and what legal privileges are gained by the two persons who have once voluntarily united as husband and wife. It is to this latter subdivision, rather than the former, that the title of husband and wife seems at the present day to apply. Reeve devotes but a brief chapter to marriage and divorce. Kent separates the subdivisions completely, applying the title of husband and wife as above. Yet Blackstone, writing before either, had devoted two-thirds of his lecture on husband and wife to the treatment of marriage and divorce alone, and very briefly disposed of the rights and disabilities of the marriage union under the same general heading. The many and rapid changes to which the entire law of husband and wife has been latterly subjected; the growth of divorce legislation on the one hand, and of property legislation for married women on the other, fully justifies a subdivision so important. We shall subordinate, then, the topic of marriage and divorce to that of the marriage status, following, in this respect, the modern legal usage; at the same time noting that, if some special term could be coined to distinguish the subdivision husband and wife from that general division which bears the same name, legal analysis would be more exact.

(3.) As to guardian and ward, the limitations of our treatise are not so easily marked out. In respect of the domestic relations, the guardian is a sort of temporary parent, created by

[1] Burn, Eccl. Law; 1 Bishop, Mar. & Div. 5th ed. §§ 48–65.

the law, to supply to young children the place of a natural protector. But the term "guardian" is used rather indiscriminately in these days with reference to all who need protection at the law. Thus we have guardians of insane persons; guardians of spendthrifts; and even guardians of the poor. Blackstone treats of these last guardians under the head of public relations; and certainly they do not fall within the clear scope of private or domestic relations. Yet the legal principles applicable to one class of guardians frequently extend as well to all others; and we shall hardly expect in these pages to trace with distinctness that shadowy line which separates the temporary parent from the town officer; nor would the consulting lawyer expect us to do so. Again, a guardian's duties are chiefly with respect to property; and herein they so nearly resemble those of testamentary trustees that one frequently finds himself gliding unconsciously from the law of the family into the law of trusts.

(4.) With the last topic of the domestic relations — that of master and servant — the rule of classification becomes even more uncertain. If servants connected with the household were alone to be considered in a treatise upon the domestic relations, the modern cases would be simple and few; but no writer has presumed to limit himself to such narrow bounds. In former centuries this relation had a marked significance. In these days we dislike to call any man master. The recent abolition of slavery in the United States has wellnigh removed all traces of an institution known to the ancient Roman empire; elsewhere recognized as the common barbarian accompaniment of barbarian triumphs; and in spirit, if not in the letter, once fastened upon the common law, while the feudal system lasted. As one of the domestic relations, this topic of master and servant is of little present importance in England or America; although it has doubtless an existence. In its analogies, however, or as a relation *sub modo*, master and servant has features which the courts constantly regard. Apprentices are, without much violation of principle, included under this head; they are generally bound out during minority and brought up in families. Clerks are not so readily confined

within the circle of domestic relations as formerly; and the same is to be said of factors, bailiffs, and stewards. The employees of a corporation are frequently designated as servants; so are laborers generally. But it cannot be denied that master and servant is rather a repulsive title, and fast losing favor in this republican country; that as one of the purely domestic relations it rarely attracts attention; and that in sounding its legal depths, one often loses sight of his landmarks, and finds himself drifting out into the more general subject of principal and agent.

§ 3. **General Characteristics of the Law of Family.** — Whether we consult the facts of history or the inspirations of human reason, the family may be justly pronounced the earliest of all social institutions. Man, in a state of nature and alone, was subject to no civil restrictions. He was independent of all laws, except those of God. But when man united with woman, both were brought under certain restraints for their mutual well-being. The propagation of offspring afforded the only means whereby society could hope to grow into a permanent and compact system. Hence the sexual cravings of nature were speedily brought under wholesome regulations; as otherwise the human race must have perished in the cradle. Natural law, or the teachings of a Divine Providence, supplied these regulations. Families preceded nations. These families at first lived under the paternal government of the person who was their patriarch or chief. But as they increased, they likewise divided; their interests became conflicting, and hostilities arose. Hence when men came afterwards to unite for their common defence, they composed a national body, and agreed to be governed by the will of him or those on whom they had conferred authority. Thus did government originate. And government, for its legitimate purposes, placed restrictions upon the governed; which restrictions thenceforth were to apply to individuals in both their family and social relations.[1] But the law of the domestic relations is nevertheless older than that of civil

[1] See Burlamaqui Nat. Law, ch. iv. §§ 6, 9.

society. In fact, nations themselves are often regarded as so many families; and the very name which is placed at the head of this work, the legislator constantly applies to the public concerns of his own country as contrasted with those of foreign governments.

The supremacy of the law of family should not be forgotten. We come under the dominion of this law at the very moment of birth; we thus continue for a certain period, whether we will or no. Long after infancy has ceased, the general obligations of parent and child may continue; for these last through life. Again we subject ourselves by marriage to a law of family; this time to find our responsibilities still further enlarged. And although the voluntary act of two parties brings them within the law, they cannot voluntarily retreat when so minded. To an unusual extent, therefore, is the law of family above, and independent of, the individual. Society provides the home; public policy fashions the system; and it remains for each one of us to accustom himself to rules which are, and must be, arbitrary.

So is the law of family universal in its adaptation. It deals directly with the individual. Its provisions are for man and woman; not for corporations or business firms. The ties of wife and child are for all classes and conditions; neither rank, wealth, nor social influence weighs heavily in the scales. To every one public law assigns a home or domicile; and this domicile determines not only the status, capacities, and rights of the person, but also his title to personal property. There is the political domicile, which limits the exercise of political rights. There is the forensic domicile, upon which is founded the jurisdiction of the courts. There is the civil domicile, which is acquired by residence and continuance in a certain place. The place of birth determines the domicile in the first instance; and one continues until another is properly chosen. The domicile of the wife follows that of the husband; the domicile of the infant may be changed by the parent. Thus does the law of domicile conform to the law of nature.

§ 4. **Law of Husband and Wife now in a Transition State; Various Property Schemes stated.** — The most interesting and

important of the domestic relations is that of husband and wife. The law of England and the United States, on this topic, is now undergoing a remarkable change; and so unsettled are its principles at the present time, with reference to the rights and obligations of the married pair, that the writer has felt constrained to depart somewhat from the usual plan of law treatises, adopting what might be termed a consecutive or historical arrangement of his materials; since otherwise the subject would furnish to the reader's mind little else than a series of unreconciled contradictions. To show clearly why the later cases conflict with the earlier will at least aid the future legislator and jurist in their efforts to place the law of husband and wife upon a firm and just basis; and meanwhile afford to the practising lawyer all the assistance which he can reasonably expect.

This confused state of the law of husband and wife is exhibited in a contest still going on between two opposing schemes for adjusting the property rights of the married parties. The one is the common-law scheme; the other resembles that of the civil law. The former is at the basis of our jurisprudence, English and American. The latter has had a powerful influence in modern times, moulding the doctrines of the equity tribunals and shaping recent legislation. Let us examine these schemes separately, and afterwards a third or intermediate scheme, known as that of community.

§ 5. **Common-Law Property Scheme.** — (1.) The common-law scheme makes unity in the marriage relation its cardinal point. But to secure this unity the law starts with the assumption that the wife's legal existence becomes suspended or extinguished during the marriage state; it sacrifices her property interests, and places her almost absolutely within her husband's keeping, so far as her civil rights are concerned. Her fortunes pass by marriage into her husband's hands, for temporary or permanent enjoyment, as the case may be; she cannot earn for herself, nor, in general, contract, sue, or be sued in her own right; and this, because she is not in legal contemplation a person. The husband loses little or nothing of his own independence by marriage; but in order

to distribute the matrimonial burdens with some approach to equality, the law compels him to pay debts on his wife's account, which he never in fact contracted, not only where she is held to be his agent by legal implication, but whenever it happens that she has brought him by marriage outstanding debts without the corresponding means of paying them. Husband and wife take certain interests in one another's lands, such as curtesy and dower, which become consummate upon survivorship. In general, their property rights are summarily adjusted by the law with reference rather to precision than principle. On the whole, however, the advantages are with the husband; and he is permitted to lord it over the wife with a somewhat despotic sway; as the old title of this subject — *baron and feme* — plainly indicates. The witty observation is not wholly inappropriate that, in the eye of the common law, husband and wife are one person, and that one is the husband.[1]

§ 6. **Civil-Law Property Scheme.** — (2.) The civil-law scheme pays little regard to the theoretic unity of a married pair. It looks rather to the personal independence of both husband and wife. Each is to be protected in the enjoyment of property rights. In the most polished ages of Roman jurisprudence we find, therefore, that husband and wife were regarded as distinct persons, with separate rights, and capable of holding distinct and separate estates. The wife was comparatively free from all civil disabilities. She was alone responsible for her own debts; she was competent to sue and be sued on her own contracts; nor could the husband subject her or her property to any liability for his debts or engagements.[2]

The more minute details of the common-law scheme of husband and wife belong to the main portion of this volume, and need not here be anticipated. Not so, however, with the civil-law scheme; and we proceed to elaborate it somewhat further. In the earlier period of Roman law the marital power of the husband was as absolute as the *patria potestas*. But before the time of the Emperor Justinian it had assumed

[1] See *post*, Part II., as to coverture doctrine.

[2] 1 Burge, Col. & For. Laws, 202, 263.

the aspect already noticed ; in which it is to be distinguished from all other codes. The *communio bonorum*, which is to be found in so many modern systems of jurisprudence whose basis is the Roman law, treats the wife's separate property and separate rights as exceptional. The peculiarities of the civil law in this respect may, perhaps, be referred to the disuse into which formal rites of marriage had fallen. Formal marriage gave to husband and wife a community of interest in each other's property. But marriage *per usum*, or by cohabitation as man and wife, which became universally prevalent in later times, did not alter the status of the female : she still remained subject to her father's power. Hence parties united in a marriage *per usum* acquired no general interest in one another's property, but only an incidental interest in certain parts of it. The wife brought her *dos ;* the husband his *anti-dos ;* in all other property each retained the rights of owners unaffected by their relation of husband and wife. The *dos* and *anti-dos* were somewhat in the nature of mutual gifts in consideration of marriage. Every species of property which might be subsequently acquired, as well as that owned at the time of marriage, could be the subject of dotal gift. The father, or other paternal ancestor of the bride, was bound to furnish the *dos*, and the husband could compel them afterwards, if they failed to do so ; the amount or value being regulated according to the means of the ancestor and the dignity of the husband. This pecuniary consideration appears to have influenced the later marriages to a very considerable extent. And while the husband had no concern with the wife's extra-dotal property, — since this she could manage and alienate free from all control or interference, — over her dotal property he acquired a dominion which was determinable on the dissolution of the marriage, unless he had become the purchaser at an estimated value. As incidental to this dominion he had the usufruct to himself, he might sue his wife or any one else who obstructed his free enjoyment, and he could alienate the personal property at pleasure. But he could not charge the real estate unless a purchaser ; and upon his death the wife's dotal

property belonged to her, or, if she had not been emancipated, to her father; and to secure its restitution after the dissolution of marriage, the wife had a tacit lien upon her husband's property. Of the *anti-dos*, or *donatio propter nuptias*, not so much is known; but this appears to have generally corresponded with the *dos;* it was restored by the wife upon the dissolution of marriage; and was regarded as her usufructuary property in like manner. It was not necessarily of the same value or amount with the wife's *dos*. Over his general property the husband retained the sole and absolute power of alienation, and his wife had no interest in it, nor could she interfere with his right of management.[1]

But the civil law allowed agreements to be made by which these rights might be regulated and varied at pleasure. And by their stipulations the married parties might so enlarge their respective interests as to provide for rights to the survivor.[2] These agreements were not unlike the antenuptial settlements so well known to our modern equity courts, which we shall consider in due course hereafter.

§ 7. **Community Property Scheme.** — (3.) The *communio bonorum*, or community system, relates to marital property, in which respect it occupies an intermediate position between the civil and common law schemes. The *communio bonorum* may have been part of the Roman law at an earlier period of its history, but it had ceased to exist long before the compilation of the Digest; though parties might by their nuptial agreement adopt it.[3] This constitutes so prominent a feature of the codes of France, Spain, and other countries of modern Europe, whence it has likewise found its way to Louisiana, Florida, Texas, California, and other adjacent States, once subject to French and Spanish dominion, and erected, in fact, out of territory acquired during the present century upon the Mississippi, the Gulf of Mexico, and the Pacific Ocean, that it deserves a brief notice.

The relation of husband and wife is regarded by these

[1] 1 Burge Col. & For. Laws, 202; *ib.* 263 *et seq.*

[2] 1 Burge Col. & For. Laws, 273.

[3] 1 Burge Col. & For. Laws, 202; *ib.* 263 *et seq.*

codes as a species of partnership, the property of which, like that of any other partnership, is primarily liable for the payment of debts. This partnership or community applies to all property acquired during marriage; and it is the well-settled rule that the debts of the partnership have priority of claim to satisfaction out of the community estate. Sometimes the community is universal, comprising not only property acquired during coverture, but all which belonged to the husband and wife before or at their marriage.[1] It is evident, therefore, that the provisions of such codes may differ widely in different States or countries. The principle which distinguishes the community from both the civil and common law schemes is, however, clear; namely, that husband and wife should have no property apart from one another.

Under modern European codes this law of community embraces profits, income, earnings, and all property which, from its nature and the interest of the owner, is the subject of his uncontrolled and absolute alienation; but certain gifts made between husband and wife in contemplation of marriage are of course properly excluded.[2] Whether antenuptial debts are to be paid from the common property, as well as debts contracted while the relation of husband and wife continues, would seem to depend upon the extent of the *communio bonorum*, as including property brought by each as capital stock to the marriage, or only such property as they acquire afterwards.[3] The codes of modern Europe recognize no general capacity of the wife to contract, sue, and be sued, as at the later civil law. On the contrary, the husband becomes, by his marriage, the curator of his wife. He has, therefore, the sole administration and management of her property, and that of the community: and she is entirely excluded in every case in which her acts cannot be referred to an authority, express or implied, from her husband.[4] Hence, too, all debts

[1] 1 Burge Col. & For. Laws, 277 *et seq.*

[2] 1 Burge Col. & For. Laws, 281, 282. By the French law only the personal estate entered into the community; but the Spanish law included both real and personal estate. Childress *v.* Cutter, 16 Mo. 24.

[3] 1 Burge, 294.

[4] *Ib.* 296, 301.

and charges are incurred by the husband. The community ceases on the termination of marriage by mutual separation or the death of either spouse.[1] And the various codes provide for the rights of the survivor on the legal dissolution of the community by death.

The reader may readily trace the influence of the community system upon the jurisprudence of Louisiana and the other States to which we have referred, whose annexation was subsequent to the adoption of our Federal Constitution, by examining their judicial reports. The Civil Code of Louisiana, as amended and promulgated in 1824, pronounced that the partnership or community of *acquêts* or gains arising during coverture should exist in every marriage where there was no stipulation to the contrary. This was a legal consequence of marriage under the Spanish law.[2] The statutes of Texas, Florida, Missouri, California, and other neighboring States, are characterized by similar features. But all of these laws have been modified by settlers bringing with them the principles of the common law. So, too, the doctrines of separate estate, revived in modern jurisprudence, are introduced into the legislation of these as other American States.[3] The American community doctrine, as we may term it, is that all property purchased or acquired during marriage, by or in the name of either husband or wife, or both, including the produce of reciprocal industry and labor, shall be deemed to belong *prima facie* to the community, and be held liable for the community marriage debts accordingly.[4] But it will be perceived that, in our American codes, community, as an

[1] *Ib.* 303, 305.

[2] Art. 2312, 2369, 2370; 2 Kent Com. 183, *n.*

[3] Texas Digest, Paschal, "Marital Rights;" Cal. Civil Code, "Husband & Wife;" Parker's Cal. Dig. "Husband and Wife;" Walker *v.* Howard, 34 Tex. 478; Caulk *v.* Picou, 23 La. Ann. 277. And see Forbes *v.* Moore, 32 Tex. 195.

[4] Louisiana Civil Code, §§ 2369–2372; Succession of Planchet, 29 La. Ann. 520; Tally *v.* Heffner, 29 La. Ann. 583. Land owned by a spouse at the time of marriage does not fall into the community. Lake *v.* Lake, 52 Cal. 428; Eslinger *v.* Eslinger, 47 Cal. 62. The wife's earnings, unless given her by the husband, and likewise property bought with such earnings, must belong to the community. Johnson *v.* Burford, 39 Tex. 242. But see Fisk *v.* Flores, 43 Tex. 340. For the American community doctrine in detail, see Schouler's Husband & Wife, §§ 339–345.

incident to marriage property, is only a presumption, which may be overcome in any instance by proof that the property was acquired as the separate estate of either the husband or wife. This community rule, moreover, as it is evident, does not apply to the property which either husband or wife brought into the marriage; such property, by the codes, being distinctly kept to each spouse apart as his or her separate property.[1] And, besides, it is now usually provided by legislation that property acquired during marriage, "by gift, bequest, devise, or descent," with the rents, issues, and profits thereof, shall be separate, not common property. The tendency, then, in our States, where the law of community still exists — though all have not proceeded in legislation to the same length — is to limit rather than extend its application. The wife has a tacit mortgage for her separate property, so far as the law may have placed it in her husband's control; also upon the community property from the time it went into his hands; and, moreover, she may, on surviving her husband, renounce the partnership or community, in which case she takes back all her effects, whether dotal, extra-dotal, hereditary, or proper.[2]

On the whole, there is in the doctrine of community much that is fair and reasonable; but in the practical workings of this system it is found rather complicated and perplexing, and hence unsatisfactory; while in no part of the United States can it be said to exist at this day in full force, since husband and wife are left pretty free to contract for the separate enjoyment of property, and so exclude the legal presumption of community altogether;[3] and moreover, the

[1] La. Code, §§ 2316, 2369, 2371; Pinard's Succession, 30 La. Ann 167; McAfee *v.* Robertson, 43 Tex. 591; Webb's Estate, Myrick's Prob. 93; Schmeltz *v.* Garey, 49 Tex. 49. But the wife should not mingle her separate funds with those of the community in making a purchase, as of her separate estate. Reid *v.* Rochereau, 2 Woods, 151. See Schouler Hus. & Wife, 341.

[2] Schoul. Hus. & Wife, §§ 341, 342. And see *ib.*, §§ 343, 344, as to the wife's separate property under these codes; viz., dotal and extra-dotal or paraphernal.

[3] See Packard *v.* Arellanes, 17 Cal. 525; Waul *v.* Kirkman, 25 Miss. 609; Succession of McLean, 12 La. Ann. 222; Jones *v.* Jones, 15 Tex. 143; *Ex parte* Melbourn, L. R. 6 Ch. 64; La. Civil Code, §§ 2369–2405; 1 Burge Col. &

constant tendency of our southwestern States is to remodel their institutions upon the Anglo-American basis, common to the original States and those of the Ohio valley.

§ 8. **The Recent Married Women's Acts.** — What are familiarly known as the "married women's acts," the product for the most part of our American legislation since 1848, and more recently engrafted upon the code of Great Britain, aim to secure to the wife the independent control of her own property, and the right to contract, sue, and be sued, without her husband, under reasonable limitations. These acts, therefore, substitute in a great measure the civil for the common law. It may be laid down that the common law, in denying to the wife the rights of ownership in property acquired by gift, purchase, bequest, or otherwise, did her injustice, and that a radical change became necessary; and this is shown, not only in the legislation of our States, but by the fact that the equity tribunals gradually moulded the unwritten law of England so as to secure like results.

All this separate property legislation, as well as the equity doctrines pertaining to the subject in England and the several United States, will be duly set forth in these pages hereafter, so far as the chaotic condition of the law at this transition period will permit.[1] And the modification of the respective property rights of a married pair by marriage contracts or settlements will also be considered.[2]

§ 9. **Marriage and Marital Influence.** — In the connubial joys to which every age and nation bears witness, the vast majority of this globe's inhabitants must have participated from one era to another, with a certain voluntary adjustment of the reciprocal burdens, such as relieved both husband and wife of a sense of bondage to one another. And thus have the inequalities, the hardships of marriage codes, proved less in practice than in literal expression. For whatever the

For. Laws, 277 *et seq*, where the law of community as it was about half a century ago is fully set forth; and the learned note to 2 Kent Com. 183. See also Schouler Hus. & Wife, §§ 335–345.

[1] See coverture doctrine, modified by equity and modern statutes, Part II., *post*.

[2] Marriage Settlements, *post*.

apparent severity of the law, human nature or love's divine instinct works in one uniform direction, namely, towards uniting the souls once brought into the arcana of married life, in an equally honorable companionship. Woman's weakness has been her strongest weapon; where her influence could not overflow, it permeated; and if her life has been, legally speaking, at her husband's mercy, her constant study to please has kept him generally merciful. She has not been superior to her race and epoch, but on the whole as well protected, as well advanced, in her day, as those of the other sex. Except for this, the wife's lot must have been miserable indeed, even under the most civilized institutions ever established. Codes and the experience of nations in this respect show strange inconsistencies: laws at one time degrading to woman, and yet marital happiness; laws at another elevating her independence to the utmost, and yet marital infelicities, lust, and bestiality.[1]

§ 10. **General Conclusions as to the Law of Husband and Wife.** — The conclusions to which this writer's investigation upon the general subject of husband and wife conducts him are these. Marriage is a relation divinely instituted for the mutual comfort, well-being, and happiness of both man and woman, for the proper nurture and maintenance of offspring, and for the education in turn of the whole human race. Its application to society being universal, the fundamental rights and duties involved in this relation are recognized by some-

[1] See examination of ancient marriage systems, including that of the Roman republic, in Schoul. Hus. & Wife, §§ 4–6.

Whether, in setting at naught that identity of interests which is essential to domestic happiness, the later Roman scheme was fatally defective, or the conjugal decay which ensued was due to causes more latent, need not here be discussed. Certain it is, however, that wide-spread incestuous intercourse, licentiousness most loathsome and unnatural, followed in the wake of marital independence; and, as the interests of husband and wife began to diverge, the bonds of family affection became weakened. When the empire sank into utter dissolution, woman possessed a large share of cultivation and personal freedom; yet she had touched the lowest depths of social degradation.

This degradation it became the mission of the Christian Church to correct during the lapse of the dark ages, by restoring the dignity of marriage, — exalting it, in fact, to a sacrament, and almost utterly prohibiting its dissolution. From so strict a view of marriage, however, Protestant countries in modern times dissent. *Ib.*

thing akin to instinct, and often designated by that name, so as to require by no means an intellectual insight; intellect, in fact, impairing often that devotedness of affection which is the essential ingredient and charm of the relation. Indeed the rudest savages understand how to bear and bring up healthy offspring. Legal and political systems are accretions based upon marriage and property; but in the family rather than individualism we find the incentive to accumulation, and in the home the primary school of the virtues, private and public. At the same time, marriage affords necessarily a discipline to both sexes; sexual indulgence is mutually permitted under healthy restraints; woman's condition becomes necessarily one of comparative subjection; man is tamed by her gentleness and the helplessness of tender offspring, and for their sake he puts a check upon his baser appetites, and concentrates his affection upon the home he has founded. Such is the conjugal union in what we term a state of nature. And now, while man frames the laws of that union, as he always does in primitive society, he regards himself as the rightful head of the family and lord of his spouse; and, somewhat indulgent of his own errant passions, he makes the chastity of his wife the one indispensable condition of their joint companionship. She, on her part, more easily chaste than himself, views with pain whatever embraces he bestows upon others of her sex. Her personal influence over him, always strong, enlarges its scope as the state advances in arts and refinement, until at length woman, as the maiden, the wife, and the matron, becomes intellectually cultivated, a recognized social power in the community. Yearning now for a wider influence and equal conditions, her attention, strongly concentrated upon the marriage relation, seeks to make the marriage terms equal: first, she desires her property secured to her own use, whether married or single, and, indignant at the inadequate remedies afforded under the law for wifely wrongs, demands the right of dismissing an unworthy husband at pleasure; moreover, as a mother, she claims that the children shall be hers not less than the father's. These first inroads are easily made; for what she demands is

theoretically just. But just at this point the peril of female influence is developed. Woman rarely comprehends the violence of man's unbridled appetite, or perceives clearly that, after all, in the moral purity and sweetness of her own sex, such as excites man's devotion, and makes home attractive, is the fundamental safeguard of life and her own most powerful lever in society, besides the surest means of keeping men themselves continent. She forgets, too, that, to protect that purity and maintain her moral elevation, a certain seclusion is needful; which seclusion is highly favorable to those domestic duties which nature assigns her as her own. More is granted woman. The bond of marriage being loosened, posterity degenerates, society goes headlong; and the flood-gates of licentiousness once fully opened, the hand must be strong that can close them again.

Happiness, we may admit, differs with the capacity, like the great and small glass equally full, which Dr. Johnson mentions. Yet marriage is suited to all capacities; and men and women are the complement of one another in all ages, neither being greatly the intellectual superior of the other at any epoch, but the man always having necessarily the advantage in physical strength and the power to rule. The best ordered marriage union for any community is that in which each sex accepts its natural place, where woman is neither the slave nor the rival of man, but his intelligent helpmate; where a sound progeny is brought up under healthy home influences. The worst is that where conjugal and parental affection fails, and all is discord and unrest, a sea without a safe harbor. To the household, stability may prove more essential than freedom, and woman's status more dignified or more degraded, as the case may be, than the law assumes to fix it.

§ 11. **Remaining Topics of the Domestic Relations; Modern Changes.** — Of the remaining topics to be discussed in the present treatise, little need be said by way of general preface. These have felt the softening influences of modern civilization. The common-law doctrine of Parent and Child finds its most important modifications in the gradual admission of the mother to something like an equal share of parental

authority ; in the growth of popular systems of education for the young ; in the enlarged opportunities of earning a livelihood afforded to the children of idle and dissolute parents ; and in the lessened misfortunes of bastard offspring. Guardian and Ward, a relation of little importance up to Blackstone's day, has rapidly developed since into a permanent and well-regulated system under the supervision of the chancery courts, and, in this country, of the tribunals also with probate jurisdiction ; and much of the old learning on this branch of the law has become rubbish for the antiquary. The law of Infancy remains comparatively unchanged. Of Master and Servant, we have spoken.

We are now to investigate in detail the law of these several topics. But first the reader is reminded that the office of the text-writer is to inform rather than invent ; to be accurate rather than original ; to chronicle the decisions of others, not his own desires ; to illumine paths already trodden ; to criticise, if need be, yet always fairly and in furtherance of the ends of justice ; to analyze, classify, and arrange ; from a mass of discordant material to extract all that is useful, separating the good from the bad, rejecting whatever is obsolete, searching at all times for guiding principles ; and, in fine, to emblazon that long list of judicial precedents through which our Anglo-Saxon freedom " broadens slowly down."

PART II.

HUSBAND AND WIFE.

CHAPTER I.

MARRIAGE.

§ 12. **Definition of Marriage.** — The word "marriage" signifies, in the first instance, that act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife. The act of union having been once accomplished, the word comes afterwards to denote the relation itself.

§ 13. **Marriage more than a Civil Contract.** — It has been frequently said in the courts of this country that marriage is nothing more than a civil contract. That it is a contract is doubtless true to a certain extent, since the law always presumes two parties of competent understanding who enter into a mutual agreement, which becomes executed, as it were, by the act of marriage. But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other; but they cannot modify the terms upon which they are to live together, nor superadd to the relation a single condition. Being once bound they are bound for ever. Mutual consent, as in all

contracts, brings them together; but mutual consent cannot part them. Death alone dissolves the tie, — unless the legislature, in the exercise of a rightful authority, interposes by general or special ordinance to pronounce a solemn divorce; and this it should do only when the grossly immoral conduct of one contracting party brings unmerited shame upon the other, disgraces an innocent offspring, and inflicts a wound upon the community. So in other respects the law of marriage differs from that of ordinary contracts. For, as concerns the parties themselves, mental capacity is not the only test of fitness, but physical capacity likewise, — a new element for consideration, no less important than the other. Again, the encumbrance of an existing union operates here as a special disqualification. Blood relationship is another. So too an infant's capacity is treated on peculiar principles, as far as the marriage contract is concerned, for he can marry young and be bound by his marriage. Third parties cannot attack a marriage because of its injury to their own interests. International law relaxes its usual requirements in favor of marriage. And finally the formal celebration now prevalent, both in England and America, is something peculiar to the marriage contract; and in its performance we see but the faintest analogy to the execution and delivery of a sealed instrument.

The earnestness with which so many of our American progenitors insisted upon the contract view of marriage may be ascribed in part to their hatred of the Papacy and ritualism, and their determination to escape the conclusion that marriage was a sacrament. By no people have the marriage vows been more sacredly performed than by ours down to a period, at all events, comparatively recent. That a State legislature is not precluded from regulating the marriage institution under any constitutional interdiction of acts impairing the obligation of contracts, or interfering with private rights and immunities, has frequently been asserted.[1] And as to the

[1] Maguire *v.* Maguire, 7 Dana, 181; Ottenheimer, 6 Oreg. 231; Adams *v.* Green *v.* State, 58 Ala. 190; Frasher Palmer, 51 Me. 480.
v. State, 3 Tex. App. 263; Rugh *v.*

private regulation of their property rights, by the contract of parties to a marriage, that, of course, is to be distinguished from their marriage, which may take place without any property regulation whatever.[1]

We are then to consider marriage not as a contract in the ordinary acceptation of the term; but as a contract *sui generis*, if, indeed, it be a contract at all; as an agreement to enter into a solemn relation which imposes its own terms. On the one hand discarding the unwarranted dogmas of the church of Rome by which marriage is elevated to the character of a sacrament, on the other we repudiate that dry definition with which the lawgiver or jurist sometimes seeks to impose upon the natural instincts of mankind. We adopt such views as the distinguished Lord Robertson held.[2] And Judge Story observes of marriage: "It appears to me something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belongs to ordinary contracts."[3] So Fraser, while defining marriage as a contract, adds in forcible language: "Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society."[4] And we may add that a recent American text-writer, of high repute upon the subject, not only pronounces for this doctrine, after a careful examination of all the authorities, but ascribes the chief embarrassment of American tribunals, in questions arising under the conflict of marriage and divorce laws, to the custom of applying the rules of ordinary contracts to the marriage relation.[5]

§ 14. **Marriages void and voidable.** — A distinction is made at law between void and voidable marriages. This distinc-

[1] Lord Stowell, in Lindo *v.* Belisario, 1 Hag. Con. 216; 1 Bish. Mar. & Div. 5th ed. § 14.

[2] Duntze *v.* Levett, Ferg. 68, 385, 397; 3 Eng. Ec. 360, 495, 502,

[3] Story Confl. Laws, § 108 *n.*

[4] 1 Fras. Dom. Rel. 87.

[5] 1 Bish. Mar. & Div. 5th ed. § 18. And see Dickson *v.* Dickson, 1 Yerg. 110, per Catron, J.; Ditson *v.* Ditson, 4 R. I. 87, per Ames, C. J.

tion, which appears to have originated in a conflict between the English ecclesiastical and common-law courts, was first announced in a statute passed during the reign of Henry VIII.; and it is also to be found in succeeding marriage and divorce acts down to the present day. The distinction of void and voidable applies not to the legal consequences of an imperfect marriage, once formally dissolved, but to the status of the parties and their offspring before such dissolution. A void marriage is a mere nullity, and its validity may be impeached in any court, whether the question arise directly or collaterally, and whether the parties be living or dead. But a voidable marriage is valid for all civil purposes until a competent tribunal has pronounced the sentence of nullity, upon direct proceedings instituted for the purpose of setting the marriage aside. When once set aside, the marriage is treated as void *ab initio;* but unless the suit for nullity reaches its conclusion during the lifetime of both parties, all proceedings fall to the ground, and both survivor and offspring stand as well as though the union had been lawful from its inception.[1] Hence we see that, while a void marriage makes cohabitation at all times unlawful, and bastardizes the issue, a voidable marriage protects intercourse between the parties for the time being, furnishes the usual incidents of survivorship, such as curtesy and dower, and encourages the propagation of children. But the moment the sentence of nullity is pronounced, the shield of the law falls, the incidents vanish, and innocent offspring are exposed to the world as bastards; and herein is the greatest hardship of a voidable marriage.

The old rule is that civil disabilities, such as idiocy and fraud, render a marriage void; while the canonical impediments, such as consanguinity and impotence, make it voidable only. This test was never a clear one, and it has become of little practical consequence at the present day. Statutes both in England and America have greatly modified the ancient law of valid marriages, and it can only be affirmed in general terms that the legislative tendency is to make mar-

[1] 1 St. 32 Hen. VIII. c. 38. See 1 Bish. Mar. & Div. 5th ed. § 108 *et seq.*

riages voidable rather than void, wherever the impediment is such as might not have been readily known to both parties before marriage; and where public policy does not rise superior to all considerations of private utility. Modern civilization strongly condemns the harsh doctrine of *ab initio* sentences of nullity; and such sentences have now in general a prospective force only, in order that rights already vested may remain unimpaired, and, still more, that children may not suffer for the follies of their parents.[1]

§ 15. **Essentials of Marriage.** — We shall consider in this chapter that act by which parties unite in matrimony, — for to this the term "marriage" is most frequently applied. It may be stated generally that, in order to constitute a perfect union, the contracting parties should be two persons of the opposite sexes, without disqualification of blood or condition, both mentally competent and physically fit to discharge the duties of the relation, neither of them being bound by a previous nuptial tie, neither of them withholding a free assent; and the expression of their mutual assent should be substantially in accordance with the prescribed forms of law. These are the essentials of marriage. Hence we are to treat of the following topics in connection with the essentials of a valid marriage: *first*, the disqualification of blood; *second*, the disqualification of civil condition; *third*, mental capacity; *fourth*, physical capacity; *fifth*, the disqualification of infancy, which in reality is based upon united considerations of mental and physical unfitness; *sixth*, prior marriage undissolved; *seventh*, force, fraud, and error; *eighth*, the formal celebration of a marriage, under which last head may be also included the consent of parents or guardians, not to be deemed an essential, except in conformity with the requirements of the marriage celebration acts. These essentials all

[1] Shelf. Mar. & Div. 154; *Ib.* 479–484; 1 Bl. Com. 434; 1 Bish. Mar. & Div. 5th ed. §§ 105–120. See Stat. 5 & 6 Will. IV. c. 54; 2 N. Y. Rev. Sts. 139, § 6; Mass. Gen. Sts. c. 106, § 4; Harrison *v.* State, 22 Md. 468; Bowers *v.* Bowers, 10 Rich. Eq. 551; Pingree *v.* Goodrich, 41 Vt. 47; Divorce, *post*. Held *contra* as to the marriage of a negro and white person. Carter *v.* Montgomery, 2 Tenn. Ch. 216. And see *post* as to impotence or physical incapacity.

have reference solely to the time, place, and circumstances of entering into the marriage relation, and not to any subsequent incapacity of either party.

§ 16. **Disqualification of Blood; Consanguinity and Affinity.**— And, *first*, as to the disqualification of blood. On no point have writers of all ages and countries been more united than in the conviction that nature abhors, as vile and unclean, all sexual intercourse between persons of near relationship. But on few subjects have they differed more widely as in the application of this conviction. Among Eastern nations, since the days of the patriarchs, practices have prevailed which to Christian nations and in days of civilized refinement, seem shocking and strange. The difficulty then is, not in discovering that there is some prohibition by God's law, but in ascertaining how far that prohibition extends. This difficulty is manifested in our language by the use of two terms, — consanguinity and affinity; one of which covers the *terra firma* of incestuous marriages, the other offers debatable ground. The disqualification of consanguinity applies to marriages between blood relations in the lineal or ascending and descending lines. There can be but one opinion concerning the union of relations as near as brother and sister. The limit of prohibition among remote collateral kindred has, however, been differently assigned in different countries. The English canonical rule is that of the Jewish law. The Greeks and Romans recognized like principles, though with various modifications and alterations of opinion. But the church of the Middle Ages found in the institution of marriage, once placed among the sacraments, a most powerful lever of social influence. The English ecclesiastical courts made use of this disqualification, extending it to the seventh degree of canonical reckoning in some cases, and beyond all reasonable bounds.[1] So intolerable became this oppression, that a statute passed in the time of Henry VIII. forbade these courts thenceforth to draw in question marriages with-

[1] In some Roman Catholic countries, — *e. g.* Portugal, — the marriage of first cousins is still pronounced incestuous. See Sottomayor *v.* De Barros, L. R. 2 P. D. 81; L. R. 3 P. D. 1.

out the Levitical degree, "not prohibited by God's law."[1] Under this statute, which is still essentially in force in England, the impediment has been treated as applicable to the whole ascending and descending line, and further, as extending to the third degree of the civil reckoning inclusive; or in other words, so as to prohibit all marriages nearer than first cousins. Archbishop Parker's table of degrees, which recognizes these limits, has been, since 1563, the standard adopted in the English ecclesiastical courts.[2] The statute prohibition includes legitimate as well as illegitimate children, and half-blood kindred equally with those of the whole blood.[3] Its principles have been recognized in the United States.[4]

But the English law goes even further, and places affinity on the same footing as consanguinity as an impediment. Affinity is the relationship which arises from marriage between a husband and his wife's kindred, and *vice versa*. It is shown that while the marriage of persons allied by blood produces offspring feeble in body and tending to insanity, that of persons connected by affinity leads to no such result; and further, that consanguinity has been everywhere recog-

[1] Stat. 32 Hen. VIII. c. 38. See 1 Bish. Mar. & Div. 5th ed. §§ 106, 107; 2 Kent Com. 82, 83; Shelf. Mar. & Div. 163 *et seq.*; Wing *v.* Taylor, 2 Swab. & T. 278, 295.

[2] 1 Bish. Mar. & Div. 5th ed. § 318; Butler *v.* Gastrill, Gilb. Ch. 156. According to this table, —

A man may not marry his	*A woman may not marry her*
1. Grandmother.	1. Grandfather.
2. Grandfather's wife.	2. Grandmother's husband.
3. Wife's grandmother.	3. Husband's grandfather.
4. Father's sister.	4. Father's brother.
5. Mother's sister.	5. Mother's brother.
6. Father's brother's wife.	6. Father's sister's husband.
7. Mother's brother's wife.	7. Mother's sister's husband.
8. Wife's father's sister.	8. Husband's father's brother.
9. Wife's mother's sister.	9. Husband's mother's brother.
10. Mother.	10. Father.
11. Step-mother.	11. Step-father.
12. Wife's mother.	12. Husband's father.
13. Daughter.	13. Son.
14. Wife's daughter.	14. Husband's son.

[3] 1 Bish. Mar. & Div. 5th ed. §§ 315, 317; Reg. *v.* Brighton, 1 B. & S. 447.

[4] Marriage between an uncle and niece has been treated as incestuous. Harrison *v.* State, 22 Md. 468; Bowers *v.* Bowers, 10 Rich. Eq. 551.

nized as an impediment, but not affinity. The worst that can probably be said of the latter is, that it leads to confusion of domestic rights and duties. No question has been discussed with more earnestness in both England and America, with less positive result, than one which turns upon this very distinction; namely, whether a man may marry his deceased wife's sister. This question has received a favorable response in Vermont.[1] But in England such marriages are still deemed incestuous, and within the prohibition of God's law, and the House of Lords resists all legislative change in this respect.[2]

Marriages within the forbidden degrees of consanguinity were formerly only voidable in English law; but by modern statutes they have been made null and void. In this country they are generally pronounced void by statute (that is to say, void from the time the sentence is pronounced),[3] and the offending parties are liable to imprisonment. But with regard to marriages among relatives by affinity, the rule is not so stringent as in England.[4]

§ 17. **Disqualification of Civil Condition; Race, Color, Social Rank, Religion.** — *Second*, as to the disqualification of civil condition. Race, color, and social rank do not appear to constitute an impediment to marriage at the common law, nor is any

[1] Blodget *v.* Brinsmaid, 9 Vt. 27; and see 1 Bish. Mar. & Div. 5th ed. § 314; Paddock *v.* Wells, 2 Barb. Ch. 331. Collamer J., in Blodget *v.* Brinsmaid, makes this ingenious distinction: "The relationship by consanguinity is, in its nature, incapable of dissolution; but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet, upon the death of his wife, he may lawfully marry her sister."

[2] Hill *v.* Good, Vaugh. 302; Harris *v.* Hicks, 2 Salk. 548; Shelf. Mar. & Div. pp. 172, 178; 2 Kent Com. 84 note, and authorities cited; Reg. *v.* Chadwick, 12 Jur. 174; 11 Q. B. 173; Pawson *v.* Brown, 41 L. T. N. S. 339; *Ex parte* Naden, L. R. 9 Ch. 670. And see Commonwealth *v.* Perryman, 2 Leigh, 717, as to the Virginia statute on this point.

[3] That is to say, not void *ab initio*. See *supra*, § 14; Harrison *v.* State, 22 Md. 468. And see Bowers *v.* Bowers, 10 Rich. Eq. 551; Parker's Appeal, 8 Wright, 309, where an incestuous marriage is treated as simply voidable.

[4] 2 Kent Com. 83, 84, and notes; 1 Bish. Mar. & Div. 5th ed. §§ 312–320; Regina *v.* Chadwick, 12 Jur. 174; Sutton *v.* Warren, 10 Met. 451; Bonham *v.* Badgley, 2 Gilm. 622; Wightman *v.* Wightman, 4 Johns. Ch. 343; Butler *v.* Gastrill, Gilb. Ch. 156; Burgess *v.* Burgess, 1 Hag. Con. 384; Blackmore *v.* Brider, 2 Phillim. 359.

such impediment now recognized in England.[1] But by local statutes in some of the United States, intermarriage has long been discouraged between persons of the negro, Indian, and white races.[2] With the recent extinction of slavery, many of these laws have passed into oblivion, together with such as refused to allow to persons held in bondage, and negroes generally, the rights of husband and wife. The thirteenth article of amendment to the Constitution gives Congress power to enforce the abolition of slavery "by appropriate legislation." As to persons formerly slaves, there are now acts of Congress which legitimate their past cohabitation, and enable them to drop the fetters of concubinage. And the manifest tendency of the day is towards removing all legal impediments of rank and condition, leaving individual tastes and social manners to impose the only restrictions of this nature.[3]

§ 18. **Mental Capacity of Parties to a Marriage.** — *Third*, as to mental capacity. No one can contract a valid marriage unless capable, at the time, of giving an intelligent consent. Hence the marriages of idiots, lunatics, and all others who have not the use of their understanding, are now treated as null; though the rule was formerly otherwise, from, perhaps, too great regard to the sanctity of the institution in the English ecclesiastical courts.[4] What degree of insanity will amount to disqualification is not easily determined; so varied are the manifestations of mental disorder at the present day, and so

[1] 1 Bish. Mar & Div. 5th ed. §§ 308–311; 1 Burge Col. & For. Laws, 138.

[2] See Bailey *v.* Fiske, 34 Me. 77; State *v.* Hooper, 5 Ire. 201; State *v.* Brady, 9 Humph. 74; Barkshire *v.* State, 7 Ind. 389; 1 Bish. Mar & Div. 5th ed. §§ 154–163; Schoul. Hus. & Wife, § 16. One drop less than one fourth negro blood saves from the taint in Virginia. McPherson *v.* Commonwealth, 28 Gratt. 939.

[3] Act July 25, 1866, c. 240; Act June 6, 1866, c. 106, § 14. And see 15th Amendment U. S. Const.; Stewart *v.* Munchandler, 2 Bush (Ky.), 278; State *v.* Harris, 63 N. C. 1. For Southern statutes which now legalize the marriages of former slaves, &c., see Schoul. Hus. & Wife, § 16.

As to statutes formerly forbidding marriage between a Roman Catholic and Protestant, see Commonwealth *v* Kenney, 120 Mass. 387; Philadelphia *v.* Williamson, 10 Phila. 176. The statute 19 Geo. II. ch. 13, to this effect, has partial reference to the solemnization of marriage by a Popish priest. These are disabilities imposed by a Protestant parliament, it is worth observing.

[4] See Lord Stowell in Turner *v.* Meyers, 1 Hag. Con. 414, 1 Bish. Mar. & Div. 5th ed. § 125.

gradually does mere feebleness of intellect shade off into hopeless idiocy. Certain it is that a person may enter into a valid marriage, notwithstanding he has a mental delusion on certain subjects, is eccentric in his habits, or is possessed of a morbid temperament, provided he displays soundness in other respects and can manage his own affairs with ordinary prudence and skill.[1] Every case stands on its own merits; but the usual test applied in the courts is that of fitness for the general transactions of life, for, it is argued, if a man is incapable of entering into other contracts, neither can he contract marriage.[2] This test is sufficiently precise for most purposes. Yet we apprehend the real issue is whether the man is capable of entering understandingly into the relation of marriage; for natural impulses are so strong that a man may know well the contract he assumes by the act of marriage, while he is not equally fit to enter into other engagements. There are two questions, however: first, whether the party understands the marriage contract; second, whether he is fit to perform understandingly the momentous obligations which that contract imposes; and both elements might well enter into the consideration of each case. "If any contract more than another," observes Lord Penzance in a recent English case, "is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, — an act by which the parties bind their property and their persons for the rest of their lives." [3]

Marriage contracted during a lucid interval is at law deemed valid;[4] but the English statute provides that such marriages are void when a commission of lunacy has once

[1] 2 Kent Com. 76; Browning *v.* Reane, 2 Phillim. 69; 1 Bish. Mar. & Div. 5th ed. §§ 124–142; Turner *v.* Meyers, 1 Hag. Con. 414; 4 Eng. Ec. 440; 1 Bl. Com. 438, 439.

[2] Mudway *v.* Croft, 3 Curt. Ec. 671; Anon., 4 Pick. 32; Cole *v.* Cole, 5 Sneed, 57; Atkinson *v.* Medford, 46 Me. 510; Ward *v.* Dulaney, 23 Miss. 410; Elzey *v.* Elzey, 1 Houst. 308; McElroy's Case, 6 W. & S. 451. See 1 Bish. Mar. & Div. § 128; *Ex parte* Glen, 4 Des. 546.

[3] Hancock *v.* Peaty, L. R. 1 P. & D. 335, 341.

[4] Shelf. Mar. & Div. 197; 1 Bish. Mar. & Div. § 130; Banker *v.* Banker, 63 N. Y. 409; Parker *v.* Parker, 6 Eng. Ec. 165; Smith *v.* Smith, 47 Miss. 211.

been taken out and remains unrevoked.[1] Similar provisions are to be found in some of our States. On the other hand, marriage contracted by a person habitually sane, during temporary insanity, is unquestionably void,[2] as of course would be any marriage contracted by one at the time permanently insane.[3]

Upon the principle of temporary insanity, drunkenness incapacitates, if carried to the excess of *delirium tremens;* though not, it would appear, if the party intoxicated retains sufficient reason to know what he is doing.[4] Drunkenness was formerly held a bad plea; for the common law permitted no one to stultify himself; but the modern rule is more reasonable. Some cases require that fraud or unfair advantage should be shown; yet the better opinion is that even this is unnecessary.[5] Deaf and dumb persons were formerly classed as idiots; this notion, however, is exploded. They may now contract marriage by signs.[6] Total blindness, or mere deafness, of course constitutes no incapacity. In general, we may add, that the disqualification of insanity is often considered in connection with fraud or undue influence exercised by or on behalf of the other contracting party, over a weak intellect, for the sake of a fortune, a title, or some other worldly advantage.[7]

Suits of nullity, brought to ascertain the facts of insanity, are favored by law both in England and America; and modern legislation discountenances all collateral disputes involv-

[1] Stat. 15 Geo. II. c. 30, (1742), not part of the common law in this country.

[2] Legeyt *v.* O'Brien, Milward, 325; Parker *v.* Parker, 6 Eng. Ec. 165.

[3] See Lord Penzance in Hancock *v.* Peaty, L. R. 1 P. & D. 335; Banker *v.* Banker, 63 N. Y. 409; McAdam *v.* Walker, 1 Dow, 148; 1 Bish. Mar. & Div. § 130; Smith *v.* Smith, 47 Miss. 211. Cf. Waymire *v.* Jetmore, 22 Ohio St. 271.

And as to development of the malady about the time of the ceremony, see Schoul. Hus. & Wife, § 19.

[4] Clement *v.* Mattison, 3 Rich. 93; 1 Bish. Mar. & Div. 5th ed. § 131; Gore *v.* Gibson, 13 M & W. 623; 2 Kent Com. 451, and authorities cited; Lord Ellenborough, in Pitt *v.* Smith, 3 Camp. 33; Scott *v.* Paquet, L. R. 1 P. C. 552.

[5] See 1 Bish. Mar. & Div. 5th ed. §§ 131, 132, and conflicting cases cited; Elzey *v.* Elzey, 1 Houst. 308; Steuart *v.* Robertson, 2 H. L. Sc. 494.

[6] 1 Bish. Mar. & Div. 5th ed. § 133, and cases cited; 1 Fras. Dom. Rel. 48; Dickenson *v.* Blisset, 1 Dickens, 268; Harrod *v.* Harrod, 1 Kay & Johns. 4.

[7] Fraud as an element of disqualification will be considered *post.*

ing questions so painful and perplexing. "Though marriage with an idiot or lunatic be absolutely void, and no sentence of avoidance be absolutely necessary," says Chancellor Kent, "yet, as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction."[1] In many States this is now the only course to be pursued, such marriages being treated as voidable and not void; and the insane spouse dying before proceedings to dissolve the marriage are begun, the survivor takes all the benefits of a valid marriage accordingly.[2]

§ 19. **Physical Capacity of Parties to Marriage; Impotence, &c.** — *Fourth.* The question of physical capacity involves an investigation of facts even more painful and humiliating than that of mental capacity. Yet as marriage is instituted, in part at least, for the indulgence of natural cravings and with a view to propagate the human family, sound morality demands that the proper means shall not be wanting. Our law demands that, at all events, the sexual desire may be fully gratified. Where impotence exists, therefore, there can be no valid marriage. By this is meant simply that the sexual organization of both parties shall be complete. But mere barrenness or incapacity of conception constitutes no legal incapacity in England and the United States, nor can a physical defect which does not interfere with copulation; nor indeed any disability which is curable, even though not actually cured, unless the party disabled unreasonably refuses to submit to the proper remedies.[3] Such refusal, however, puts

[1] 2 Kent Com. 76.

[2] 1 Bish. Mar. & Div. 5th ed. §§ 136–142; Goshen *v.* Richmond, 4 Allen, 458; Hamaker *v.* Hamaker, 18 Ill. 137; Williamson *v.* Williams, 3 Jones Eq. 446; Wiser *v.* Lockwood, 42 Vt. 720; Brown *v.* Westbrook, 27 Ga. 102; Stuckey *v.* Mathes, 31 N. Y. Supr. 461. As to bringing such suits, see, further, 1 Bish. Mar. & Div. §§ 139–142; Schoul. Hus. & Wife, § 21.

[3] 1 Bish. Mar. & Div. §§ 321–340, and cases cited; 1 Fras. Dom. Rel. 53; B. *v.* B., 28 E. L. & Eq. 95; 1 Bl. Com. 440, *n.*, by Chitty and others; Ayl. Parer. 227, Devanbagh *v.* Devanbagh, 5 Paige, 554; Essex *v.* Essex, 2 Howell St. Tr. 786; Briggs *v.* Morgan, 3 Phillim. 325. For a case where the disability was possibly curable, see G. *v.* G., L. R. 2 P. & D. 287.

the disabled spouse clearly in the wrong.[1] The refusal of carnal intercourse by a healthy spouse is quite a different matter, and gives rise to other inquiries under the head of divorce;[2] nor certainly can physical incapacity arising from some cause subsequent to marriage be referred to the present subject, the question being as to incapacity at the date of marriage.[3]

The reader will find Dr. Lushington's opinion in the leading case of *Deane* v. *Aveling*[4] sufficiently suggestive as to the extent of malformation which invalidates a marriage on the ground of physical incapacity. It will be observed that this case establishes a principle which later cases do not undermine, namely, that it is capacity for fulfilling the conditions of copulation, and not of procreation, that our own law regards. We may add that, with the rapid progress of medical science during the present century, cases of absolute and incurable impotence are happily diminishing in number.[5]

§ 20. **Disqualification of Infancy.** — *Fifth.* Infancy may be an impediment to marriage; but only so far, on principle, as the marrying party, by reason of imperfect mental and physical development, may be brought within the reason of the last two rules. Hence we find that infancy is not a bar to marriage to the same extent as in ordinary contracts; since minors cannot repudiate their choice of husband or wife on reaching majority. Not that marriage calls for less discrimination, for it carries with it consequences far beyond all other contracts, involving property rights of the gravest import; but because public policy must protect the marriage institution against the reckless imprudence of individuals. A certain period is established, called the age of consent, which in England is fixed at fourteen for males and twelve for females,

[1] H. *v.* P., L. R. 3 P. & D. 126.

[2] See, further, Schoul. Hus. & Wife, § 22; Cowles *v.* Cowles, 112 Mass. 298.

[3] See Morrell *v.* Morrell, 24 N. Y. Supr. 324.

[4] 1 Robertson, 279, 298. And see recent case of U. *v.* J., L. R. 1 P. & D. 460.

[5] See recent cases: T. *v.* M., L. R. 1 P. & D. 31; T. *v.* D., L. R. 1 P. & D. 127; Carll *v.* Prince, L. R. 1 Ex. 246. But with modern facilities, including the right of parties to testify in their own suits, such cases appear to be on the increase in the courts of Great Britain. See 1 Bish. § 331; Schoul. Hus. & Wife, § 23, as to sentences of nullity in such cases.

a rule adopted from the Roman law, but which, in this country, varies all the way from fourteen to eighteen for males and twelve to sixteen for females, according to local statutes; differences of climate and physical temperament contributing, doubtless, to make the rule of nature, in this respect, a fluctuating one.[1] Marriages without the age of consent are as binding as those of adults; marriages within such age may be avoided by either party on reaching the period fixed by law. And even though one of the parties was of suitable age and the other too young, at the time of marriage, yet the former, it appears, may disaffirm as well as the latter.[2] Herein is observed a departure from that principle of law, that an infant may avoid his contract while the adult remains bound; it is a concession which the law makes in favor of mutuality in the marriage compacts. Marriages celebrated before both parties have reached the age of consent may be disaffirmed in season, either with or without a judicial sentence. When the age of consent is reached, no new ceremony is requisite to complete the marriage at the common law; but election to affirm will then be inferred from circumstances, such as continued intercourse, and even slight acts may suffice to show the intention of the parties. If they then choose to remain husband and wife, they are bound for ever. Disaffirmance, on the other hand, may be either with or without a judicial sentence.[3] Marriage within the age of consent seems therefore to be neither strictly void nor strictly voidable, but rather inchoate and imperfect;[4] with,

[1] See 2 Kent Com. 79, notes, showing the periods fixed in different States as the age of consent. In the old States the common-law rule generally prevails. In Ohio, Indiana, and other Western States, the age of consent is raised to eighteen for males, and fourteen for females. See also Bennett *v.* Smith, 21 Barb. 439, as to the power of the New York courts to annul marriages with persons under age.

[2] Co. Litt. 79, and Harg. *n.* 45; 1 East P. C. 468; 1 Bish. Mar. & Div. 5th ed. § 149. But it is not certain that a party of competent age may disaffirm equally with the party incompetent. People *v.* Slack, 15 Mich. 193.

[3] 1 Bish. Mar. & Div. § 150.

[4] Co. Litt. 33 *a*; 2 Kent Com. 78, 79; 1 Bish. Mar. & Div. 5th ed. §§ 143–153, and cases cited; 1 Bl. Com. 436; 1 Fras. Dom. Rel. 42; Parton *v.* Hervey, 1 Gray, 119; Fitzpatrick *v.* Fitzpatrick, 6 Nev. 63. See Shafher *v.* State, 20 Ohio, 1, *contra*, Goodwin *v.* Thompson, 2 Iowa, 329; Aymar *v.* Roff, 3 Johns. Ch. 49, as to the invalidity of such marriages unless confirmed

however, a reservation by the ecclesiastical law as to marriage with an infant below seven years, which is treated as altogether null.[1]

§ 21. **Disqualification of Prior Marriage Undissolved; Polygamy; Bigamy.** — *Sixth*, as to the impediment of prior marriage undissolved. It is a well-established rule in civilized countries that marriage between parties, one of whom is bound by an existing marriage tie, is not only void, but subjects the offenders to criminal prosecution.[2] Polygamy, or bigamy as it is often termed, — since the common law of England could scarcely conceive of such conjunctions carried beyond a double marriage, — is discarded by all Christian communities. It is tolerated, though not sanctioned, in certain territory of the United States. The fundamental doctrine of Christian marriage is that no length of separation can dissolve the union, so long as both parties are actually living, even though lapse of time should raise a reasonable supposition of death. But to render the second marriage void at law, the first should have been valid in all respects.[3] Some of the harsher features of the old law have been softened in our own legislation; and statutes are not uncommon which possibly extend facilities for divorce from the old relation, and in any event protect the offspring of a new marriage contracted erroneously, but in good faith, by parties who had reason to believe a former spouse dead.[4] So, too, polygamy in fact is relieved of its penal consequences as concerns parties not guilty of polygamy in intention; but a certain period must elapse — usually seven years — before death can be presumed from one's mere continuous absence without being heard from. Such was one of the provisions in the English statute passed to make bigamy a civil offence, in the reign of

by cohabitation after reaching the statutory age. Local statutes affect this whole subject.

[1] 2 Burn. Ec. Law, 434; 1 Bish. Mar. & Div. § 147.

[2] Cro. Eliz. 858; 1 Salk. 121; 2 Kent Com. 79, and notes; 1 Bish. Mar. & Div. §§ 296-303, and authorities cited; Shelf. Mar. & Div. 224; Hyde *v.* Hyde, L. R. 1 P. & D. 130.

[3] Bruce *v.* Burke, 2 Add. Ec. 471; 2 Eng. Ec. 381; Reg. *v.* Chadwick, 12 Jur. 174; Patterson *v.* Gaines, 6 How. (U. S.) 550.

[4] See 2 N. Y. Rev. Stat. p. 139, §§ 6, 7; Mass. Gen. Sts. c. 107, §§ 4, 30.

James I.,[1] which also exempted from punishment for bigamy persons remarried, during the lifetime of the former spouse, after a divorce, sentence of nullity, or disaffirmance on reaching age of consent. Similar statutes for the punishment of bigamy, with similar reservations, are enacted in this country; but in England and the United States some defects of the original legislation are now cured, and divorce from bed and board would not exempt an offender from prosecution.[2] Polygamy, with such exceptions, remains an indictable offence.

One of its less obvious evils — though not the least important when polygamy is regarded as a legalized institution in a free country — is that the patriarchal principle which it introduces is thoroughly hostile to free institutions; this fact was pointed out many years ago by one of our best writers on political ethics.[3]

Nor is a new marriage entered into by one spouse in good faith, and in full but erroneous belief that the other spouse is dead, valid even after the lapse of the statutory absence; such parties are not free to marry again, but only relieved of the worst consequences.[4]

§ 22. **Same Subject; Impediments following Divorce.** — Under this same head may be considered a disqualification introduced into some parts of this country by legislative enact-

[1] Stat. 1 Jac. I. c. 11, 1604. See Queen *v.* Lumley, L. R. 1 C. C. 196; Queen *v.* Curgerwen, L. R. 1 C. C. 1.

[2] In New York the period of absence is five years; in Ohio, three years; in Massachusetts, seven years, but with a special relaxation of the penalty. Still further, see 2 Kent Com. 79, and notes. See also Stats. 9 Geo. IV. c. 31; 24 & 25 Vict. c. 100; 1 Bish. § 297. Legitimating statutes are to be found in numerous States on behalf of the offspring of innocent marriages of this kind. 1 Bish. § 301; cases *infra*.

[3] 2 Lieber Pol. Ethics, 9, cited in note to 2 Kent Com. 81.

As to prosecutions for bigamy, see Kopke *v.* People, 43 Mich. 41; Reeves *v.* Reeves, 54 Ill. 332; Queen *v.* Allen, L. R. 1 C C. 367, and other cases cited Schoul. Hus. & Wife, § 25; also "Bigamy" in Bishop or Wharton on Criminal Law.

[4] Glass *v.* Glass, 114 Mass. 563, and cases cited; Williamson *v.* Parisien, 1 Johns. Ch. 389; Miles *v.* Chilton, 1 Robertson, 684; Spicer *v.* Spicer, 16 Abb. Pr. N. S. 112; 1 Bish. Mar. & Div. § 299. Such marriage, under Massachusetts statutes, may be annulled by a sentence containing (in order to make children begotten before the commencement of the suit legitimate) the statement that it was contracted in good faith and with the full belief of the parties that the absent spouse was dead Glass *v.* Glass, *supra*. Lawful competence to marry again results, however, under some local statutes, from such absence. Strode *v.* Strode, 3 Bush, 227.

ments; namely, the impediment which follows divorce.[1] A divorce *a vinculo* should on general principles leave both parties free to marry again. But such is not always the case. Thus, in Kentucky, the person injured may not marry again before the expiration of two years from the decree of dissolution.[2] And in several States the guilty party is prohibited from marrying again during the lifetime of the innocent spouse divorced, — a provision of law seemingly more judicious to apply *in terrorem* by way of prevention than as a suitable method of punishment.[3] In Scotland there is a peculiar, but not unreasonable law, which forbids the guilty party after divorce from marrying the *particeps criminis*; this was framed evidently to defeat collusive practices between persons desiring to put away an outstanding obstacle to their own union.[4]

§ 23. **Force, Fraud, and Error, in Marriage.** — *Seventh.* All marriages procured by force or fraud, or involving palpable error, are void; for here the element of mutual consent is wanting, so essential to every contract.[5] The law treats a matrimonial union of this kind as absolutely void *ab initio*, and permits its validity to be questioned in any court; at the option, however, of the injured party, who may elect to abide by the consequences when left free to give or withhold assent. Force implies a physical constraint of the will; fraud, some deception practised, whereby an unnatural state of the will is brought about.[6] Cases of palpable error, which are very rare, usually contain one or both of these ingredients.

What amount of force is sufficient to invalidate a marriage is a question of circumstances. Evidently the same test could not apply to the mature and the immature, to the strong and the weak, to man and to woman. The general rule is that

[1] 1 Bish. Mar. & Div. 5th ed. §§ 304–307; Schoul. Hus. & Wife, § 26.

[2] Cox *v.* Combs, 8 B. Monr. 231.

[3] See Parke *v.* Barron, 20 Ga. 702; Clark *v.* Cassidy, 62 Ga. 407; Kinnier *v.* Kinnier, 53 Barb. 454.

[4] 1 Fras. Dom. Rel. 82.

[5] 2 Kent Com. 76, 77; 1 Bish. Mar. & Div. 5th ed. §§ 164–215; Harford *v.* Morris, 2 Hag. Con. 423; 4 Eng. Ec. 575; Countess of Portsmouth *v.* Earl of Portsmouth, 1 Hag. Ec. 355; 3 Eng. Ec. 154; Scott *v.* Shufeldt, 5 Paige, 43; Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 104; 4 Eng. Ec. 485; Keyes *v.* Keyes, 2 Fost. 553.

[6] 1 Fras. Dom. Rel. 234.

such amount of force as might naturally serve to overcome one's free volition and inspire terror will render the marriage null.[1] And where the party employing force sustains a superior relation of influence, or a post of confidence affording him opportunities which he chooses to abuse, this circumstance carries great weight. Thus in *Harford* v. *Morris*, where one of the guardians of a young and timid school-girl, having great influence and authority over her, took her to a foreign country, hurried her from place to place, and then married her without her free consent, the marriage was set aside;[2] and similar consequences attended more recently the marriage of a young school-girl to her father's coachman, who pursued his scheme while taking her out to ride.[3]

So marriage by compulsion is procured when one under illegal arrest is forced to marry; and so probably, though the arrest was legal, if malicious circumstances are manifest.[4] But if a single man under legal arrest, by advice of the officer or magistrate, marries the woman whom he has seduced or got with bastard offspring, in order to escape prosecution, the law will favor a presumption of honest repentance on his part, and hold him bound;[5] substantial justice being thereby done to the utmost, and the lesser scandal to society permitted in order to avert the greater.

As to fraud, in order to vitiate a marriage, it should go to the very essence of the contract. But what constitutes this essence? The marriage relation is not to be disturbed for

[1] Shelf. Mar. & Div. 213; 1 Bish. Mar. & Div. 5th ed. § 211.

[2] 2 Hag. Con. 423; 4 Eng. Ec. 575.

[3] Lyndon *v.* Lyndon, 69 Ill. 43.

[4] Reg. *v.* Orgill, 9 Car. & P. 80; Soule *v.* Bonney, 37 Me. 128; Collins *v.* Collins, 2 Brews. (Pa.) 515; Barton *v.* Morris, 15 Ohio, 408; Benton *v.* Benton, 1 Day, 111; 1 Bish. Mar. & Div. 5th ed. § 212.

A man is sometimes forced into a marriage which ought to be annulled. See Bassett *v.* Bassett, 9 Bush, 696. In Willard *v.* Willard, 6 Baxter, 297, before testimony was taken, an allegation of duress was sustained against demurrer. Here the man claimed that the woman's brother seized him on the highway, and forced him to marry her, and that as soon as the duress was over he escaped; also that the woman had a child three months afterwards. Duress was claimed by the husband in Vroom *v.* Marsh, 29 N. J. Eq. 15, but the court allowed alimony *pendente lite* to the wife, she denying the charge.

[5] Jackson *v.* Winne, 7 Wend. 47; Sickles *v.* Carson, 26 N. J. Eq. 440; Honnett *v.* Honnett, 33 Ark. 156; State *v.* Davis, 79 N. C. 603; Johns *v.* Johns, 44 Tex. 40; Williams *v.* State, 44 Ala. 24.

trifles, nor can the cumbrous machinery of the courts be brought to bear upon impalpable things. The law, it has been well observed, makes no provision for the relief of a blind credulity, however it may have been produced.[1] Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament, cannot therefore vitiate the contract. *Caveat emptor* is the harsh but necessary maxim of the law. Love, however indispensable in an æsthetic sense, is by no means a legal essential to marriage; simply because it cannot be weighed in the scales of justice. So, too, all such matters are peculiarly within the knowledge of the parties themselves, and they are put upon reasonable inquiry.

Not even does the concealment of previous unchaste and immoral behavior in general vitiate a marriage; for although this seems to strike into the essence of the contract, yet public policy pronounces otherwise, and opens marriage as the gateway to repentance and virtue.[2] If the profligate continue a profligate after marriage, the divorce laws afford a means of escape to the deluded victim. Still, as this doctrine seems to bear hard upon innocent persons marrying in good faith and with misplaced confidence, it is applied not without some limitations. Thus it is held in Massachusetts that where a woman, pregnant by another man at the time of the nuptials, bears a child soon after to an innocent husband, the marriage may be avoided by him; for she has thereby not only inflicted upon him, by deception, the grossest possible moral injury, but subjected them both to scandal and ill-repute.[3] The same court, however, has taken heed not to press this exception far, refusing to allow one to shake off the obligations he has contracted with a woman whom he knew before

[1] Lord Stowell, in Wakefield *v.* Mackay, 1 Phillim. 137; 2 Kent Com. 77; 1 Bish. Mar. & Div. 5th ed, §§ 166–168; Schoul. Hus. & Wife, § 530.

[2] 1 Bish. Mar. & Div. §§ 170, 179; Rogers Ec. Law, 2d ed. 644; 1 Fras. Dom. Rel. 231; Ayl. Parer. 362, 363; Swinb. Spousals, 2d ed. 152; Best *v.* Best, 1 Add. Ec. 411; 2 Eng. Ec. 158; Leavitt *v.* Leavitt, 13 Mich. 452; Wier *v* Still, 31 Iowa, 107.

[3] Reynolds *v.* Reynolds, 3 Allen, 605. See also Baker *v.* Baker, 13 Cal. 87; Montgomery *v.* Montgomery, 3 Barb. Ch. 132; Morris *v.* Morris, Wright, 630.

marriage to be with child, and in fact had himself debauched, notwithstanding he married upon the faith of her previous assurances that her pregnancy was by him, and was undeceived by the time the child came into the world.[1] And, furthermore, if a man marries any woman whom he knows to be unchaste and pregnant, it is his own folly if he places implicit confidence in any of her statements.[2] But whenever an innocent man marries a woman, supposing her, with reason, to be virtuous, and she conceals her pregnancy from him, the subsequent production of another man's child so unpleasantly complicates the marriage relation that he ought to be allowed his exit if he so desires, both in justice to himself and because the woman knew the risk she ran of bringing the parental relation to shame by marrying, and chose to incur it. In short, while marriage may be accepted by any one whose past life has been dissolute, as the portal to a new and honest career, for which reason concealment of the past cannot legally be predicated of either party as an essential fraud, we apprehend that the woman who brings surreptitiously to the marriage bed the incumbrance of some outside illicit connection introduces a disqualification to the union as real as the physical impotence of a man would be, resulting from his own lasciviousness.

As to error, it may be said, as in fraud, that the error should reach the essentials; and Chancellor Kent justly observes that it would be difficult to find a case where simple error, without some other element, would be permitted to vacate a marriage.[3] There is an English case in point, where a man courted and afterwards married a young lady, believing her to be a certain rich widow, whom he had known only by reputation. She and her friends had countenanced the deception. It was held, nevertheless, that the marriage must

[1] Foss *v.* Foss, 12 Allen, 26. It was here suggested by the court that the man might have taken medical or other advice before marriage, instead of relying upon the woman's word. As to such statute cause of divorce, see Schoul. Hus. & Wife.

[2] Crehore *v.* Crehore, 97 Mass. 330.

[3] 2 Kent Com. 77. See Lord Campbell, in Reg. *v.* Millis, 10 Cl. & F. 534, 785; 1 Bish. Mar. & Div. 5th ed § 207; Clowes *v.* Clowes, 3 Curt. Ec. 185, 191.

stand.[1] But the palpable substitution of some other individual for the person actually accepted and intended for marriage may properly be repudiated by the victim to the fraud.[2] And some cases have gone even farther, as where a scoundrel palms himself off as a certain individual of good repute;[3] though, generally speaking, deception as to name is not regarded as more fatal than deception as to character or fortune.

The element of imperfect consent is readily associated with cases of the present class. Thus, if a person is unwittingly entrapped into a marriage ceremony, not meaning nor affording reason for the other party to believe that it should be binding, this marriage may be repudiated.[4] And in general a mock marriage in jest is no marriage.[5]

§ 24. **Force, Fraud, and Error: Subject continued.** — In most of the reported cases of force, fraud, and error, two or more of these elements are united; and frequently another distinct impediment appears, such as tender years on the part of the injured party; or, with regard to the offender, the suppression of material facts relative to some former marriage, or to his own mental or physical incapacity; or some other cause of nullity is shown by the evidence. In the reported cases, where the complainant was successful, some unprincipled man has generally sought to gain undue advantages from the person and fortunes of one whose feebler will rendered her an easy prey; it rarely, if ever, appears that such force or fraud led to a reasonable and well-assorted match. Such unequal alliances need find favor from no tribunal.[6]

All marriages of this sort are binding without further ceremony, provided the injured party sees fit to affirm it after all constraint is removed, or, in other words, to perfect the con-

[1] Feilding's Case, cited in Burke's Celebrated Trials, 63, 78, and in 1 Bish. Mar. & Div. 5th ed. § 204.

[2] Fiction supplies such instances, as in Scott's novel, St. Ronan's Well. And see 2 Kent Com. 77; 1 Bish. § 207.

[3] Rex *v.* Burton, 3 M. & S. 537.

[4] Clark *v.* Field, 13 Vt. 460.

[5] McClurg *v.* Terry, 21 N. J. Eq. 225. See *post*, § 26.

[6] See Heffer *v.* Heffer, 3 M. & S. 265; Rex *v.* Burton-upon-Trent, 3 M. & S. 537; Swift *v.* Kelly, 3 Knapp, 257; Nace *v.* Boyer, 6 Casey, 99; Robertson *v.* Cole, 12 Tex. 356; Cameron *v.* Malcolm, Mor. 12586, cited 1 Bish. § 199; Lyndon *v.* Lyndon, 69 Ill. 43; Powell *v.* Cobb, 3 Jones Eq. 456.

sent; but no such freedom of choice seems to be left to the offending party. Hence, this sort of marriage seems neither void nor voidable in the legal acceptation; but rather inchoate or incomplete until ratified, though void if the injured choose so to treat it. Where consummation never followed the nuptials, the courts are the more readily disposed to set aside the match;[1] but in any event copulation, with knowledge of the fraud, and after removal of all constraint, is an effectual bar to relief.[2]

The issue, we may add, is between the offender and the injured party, and third persons have no right to interfere, although it be alleged that there was intent to defraud them in their own property interests.[3] In fact, marriage stands or falls by public permission with reference only to the marriage parties; and wherever they have legally assumed the relation as one agreeable to themselves, outsiders cannot meddle with the status from outside considerations. Where, too, a marriage has been effected through the fraudulent conspiracy of third persons, the rule is that, unless one of the contracting parties is cognizant of the fraud, the marriage is perfect; but, if cognizant, it is to be deemed the fraud of such party and treated accordingly.[4]

§ 25. **Essential of Marriage Celebration.** — *Eighth.* We are now brought to the important subject of the formal marriage celebration. Here there is a wide difference noticeable between general principles and established practice. We are to consider this topic, then, in two separate aspects: (1) as to marriage observance in the absence of civil requirements; (2) as to marriage observance under the statutes now in force in England and America.

It is to be premised, however, by way of enlarging upon

[1] Lyndon *v.* Lyndon, 69 Ill. 43; Robertson *v.* Cole, 12 Tex. 356; Cameron *v.* Malcolm, *supra.*

[2] 1 Bish. Mar. & Div. 5th ed, §§ 214, 215; 1 Burge Col. & For. Laws, 137; 1 Fras. Dom. Rel. 229; Scott *v.* Shufeldt, 5 Paige, 43; Leavitt *v.* Leavitt, 13 Mich. 452; Hampstead *v.* Plaistow, 49 N. H. 84.

[3] McKinney *v.* Clarke, 2 Swan, 321.

[4] Sullivan *v.* Sullivan, 2 Hag. Con. 238, 246; Rex *v.* Minshull, 1 Nev. & M. 277; 1 Bish. Mar. & Div. § 173, *et seq.*; Barnes *v.* Wyethe, 28 Vt. 41; Bassett *v.* Bassett, 9 Bush, 696.

the idea of perfect and imperfect consent suggested under the last head, that some form of marriage promise, some ceremony, however slight, has always been deemed essential to the validity of marriage. The common language of the books is, that, in the absence of civil regulations to the contrary, marriage is a contract, and nothing but mutual consent is required. And the old maxim of the Roman law is quoted to support this view: *Nuptias non concubitus, sed consensus, facit.*[1] But is there not an ambiguity in the use of such language? For it is material to ask whether *consensus*, or *consent*, is used in the sense of simple volition or an expression of volition. We maintain that the latter is the correct legal view; and that it should be said that the law requires in such cases *a simple expression of mutual consent*, and no more. For the very definition of marriage implies that there should be not only the consenting mind, but an expression of the consenting mind, by words or signs, which expression in proper form constitutes in fact the marriage agreement. It is in this sense that we shall apply the terms *formal* and *informal* to marriage in the following sections.

§ 26. **Same Subject; Informal Celebration.** — (1) To constitute a marriage, then, where there are no civil requirements, — or, in other words, to constitute an informal marriage, — words clearly expressing mutual consent are sufficient without other solemnities. Two forms of consent are mentioned in the books: the one, consent *per verba de præsenti*, with or without consummation; the other, consent *per verba de futuro*, followed by consummation.[2] Some writers have added a third form of consent, — by habit and repute; but this is, very clearly, nothing more than evidence of consummated marriage amounting to a presumption conclusive enough for the purpose at hand.[3] So, too, there is reason to suppose that the

[1] See 2 Kent Com. 86, 87; Co. Litt. 33 *a*; 1 Bish. Mar. & Div. §§ 218–267.

[2] Swinb. Spousals, 2d ed. 8; 2 Burn Ec. Law, Phillim. ed. 455 *e*; Lord Cottenham, in Stewart *v.* Menzies, 2 Rob. Ap. Cas. 547; 1 Bish. Mar. & Div. 5th ed. § 227.

[3] Lord Selborne, in the recent case of De Thoren *v.* Attorney-General, 1 H. L. App. 686, confirms this view. See also Breadalbane's Case, L. R. 1 H. L. Sc. 182.

marriage *per verba de futuro* is of the same sort as the former; marriage *per verba de præsenti* constituting the only real marriage promise, while consummation following *de futuro* words of promise raises a legal presumption, not probably conclusive, that words *de præsenti* afterwards passed between the parties. The copula is no part of the marriage; it only serves to some extent as evidence of marriage.[1] *Consensus, non concubitus*, is the maxim of the civil, ecclesiastical, and common law alike.[2]

Informal celebration constitutes marriage as known to natural and public law. The English canon law, as it stood previous to the Council of Trent, the law of Scotland, the law of some of the United States, and perhaps the common law of England, all dispense with the ceremonial observances of formal marriage.[3] Informal marriage is to be sustained on the theory that an institution of such fundamental importance to our race ought to be good independently of, and prior to, the formal requirements which human government imposes at an advanced stage of society. But, as we shall see, the marriage acts now in force in England and many of the United States render certain solemnities, religious or secular, indispensable. Most of the continuous decisions relating to informal marriages are therefore to be found in the Scotch reports, where the general doctrine has been pretty fully discussed. And the great, the almost insuperable, difficulty which presents itself at the outset in such cases is thus clearly indicated by Lord Stowell in *Lindo* v. *Belisario*: "A

[1] Port *v.* Port, 70 Ill. 484; 1 Bish. Mar. & Div. 5th ed. §§ 228, 254; Jackson *v.* Winne, 7 Wend. 47; Dumaresly *v.* Fishly, 3 A. K. Marsh. 368, 372; Peck *v.* Peck, 12 R. I. 485.

[2] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54; 4 Eng. Ec. 485, 489; Shelf. Mar. & Div. 5–7.

[3] Informal marriage has been recognized to a greater or less extent in the United States. Dickerson *v.* Brown, 49 Miss. 357; Hutchins *v.* Kimmell, 31 Mich. 126; Port *v.* Port, 70 Ill. 484; Lewis *v.* Ames, 44 Tex. 319; Dyer *v.* Brannock, 66 Mo. 391; Campbell *v.* Gullatt, 43 Ala. 57; Askew *v.* Dupree, 30 Ga. 173. But Maryland repudiates the doctrine of informal marriages: Denison *v.* Denison, 35 Md. 361; as, by force of statute or otherwise, do certain other States. See 1 Bishop, § 279; Estill *v.* Rogers, 1 Bush, 62; Holmes *v.* Holmes, 1 Abb. (U. S.) 525; Robertson *v.* State, 42 Ala. 509; State *v.* Miller, 23 Minn. 352; Commonwealth *v.* Munson, 127 Mass. 459; State *v.* Hodgskins, 19 Me. 155; Schoul. Hus. & Wife, §§ 31–34.

marriage is not every carnal commerce; nor would it be so even in the law of nature. A mere carnal commerce, without the intention of cohabitation and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation, — that, in a state of nature, would be a marriage; and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is properly called, *a marriage in the sight of God.*" [1] Did parties therefore coming thus together mean fornication or did they mean marriage?

Here it is seen that there should not only be words of promise, but that they should be uttered with matrimonial intent. To ascertain the purpose of the parties in each case, the courts will look at all the circumstances, and even admit parol evidence to contradict the terms of a written contract; in this respect modifying the ordinary rules of evidence. For writings of matrimonial acknowledgment may have been interchanged as a blind or cover for some scheme well understood between the parties.[2] Or again by way of jest.[3] But, in cases of doubt, the rule is to sustain the marriage as lawful and binding. If there has been continued intercourse between the parties, this presumption becomes of course still stronger. And if promises were exchanged while one acted in good faith and in earnest, the other is not permitted to plead a mental reservation.[4]

Hence, we may observe, generally, that a betrothal followed by copulation does not make this informal marriage a legal one, when the parties looked forward to a formal marriage ceremony, and did not agree to become husband and

[1] 1 Hag. Con. 216; 4 Eng. Ec. 367, 374. See 1 Bish. Mar. & Div. 5th ed. §§ 216–267, and cases cited; 2 Kent Com. 86 and *n.*; 1 Fras. Dom. Rel. 149, 184, 187, 212.

[2] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 105; 4 Eng. Ec. 485, 508, 509, cited in 1 Bish. Mar. & Div. 5th ed. §§ 239–241.

[3] *Ib.*; *supra*, § 23; McClurg *v.* Terry, 21 N. J. Eq. 225; Clark *v.* Field, 13 Vt. 460.

[4] *Ib.* And see 1 Fras. Dom. Rel. 213; Lockyer *v.* Sinclair, 8 Scotch Sess. Cas. N. S. 582.

wife without it.[1] If, too, a woman, in surrendering her person to a man, is conscious that she is committing an act of fornication instead of consummating such a marriage, the copula cannot, for her sake, be connected with any previous words of promise so as to constitute a marriage.[2] And a union once originating between man and woman, purely illicit in its character, and voluntarily so, there must appear some formal and explicit agreement between the parties thereto, or a marriage ceremony, or some open and visible change in their habits and relations, pointing to honest intentions, before their alliance can be regarded as converted into either a formal or an informal marriage.[3]

Nor is the issue between informal marriage and illicit intercourse to be concluded by the conduct of the pair towards society. They may, for convenience or decency's sake, hold themselves out to third persons as man and wife, while yet sustaining at law, and intentionally, a purely meretricious relation.[4]

And yet a proper regard for the real intention of the cohabiting pair encourages often the presumption of innocence and good faith, even where the relation assumed was an illegal one. Supposing two persons to have made an informal marriage, in the mistaken belief that the former spouse of one of them was already dead, or that some sentence of divorce left them, in like manner, free to unite. This case should be distinguished from that of some original understanding for a mere carnal commerce. And if the impediment becomes removed in the course of their cohabitation under such circumstances, and the pair live continuously together as man and wife, no new ceremony, agreement, or visible change in their relation would probably be deemed requisite to establish mat-

[1] Peck *v.* Peck, 12 R. I. 485; Beverson's Estate, 47 Cal. 621.

[2] Port *v.* Port, 70 Ill. 484.

[3] See Floyd *v.* Calvert, 53 Miss. 37; Duncan *v.* Duncan, 10 Ohio St. 181; Hunt's Appeal, 86 Penn. St. 294; Williams *v.* Williams, 46 Wis. 464; Barnum *v.* Barnum, 42 Md. 251. Perhaps the Scotch law is less emphatic on this point. It is stated in Breadalbane's Case, L. R. 1 H. L. Sc. 182, that a connection beginning as adulterous may, on ceasing to be so, become matrimonial by consent, and evidenced by habit and repute, without a public act.

[4] Howe's Estate, Myrick's Probate, 100.

rimonial consent subsequent to the removal of the impediment; for here the original intention continues, but in the case of carnal commerce necessarily changes, in order that an honest relation may be presumed.[1]

Disbelief in ceremonials, or conscientious scruples, may be alleged in support of an informal marriage, by way of preference, where such latter marriage is held lawful, and the parties mutually contracted with the view of a lawful union.[2]

[1] See De Thoren *v.* Attorney-General, 1 H. L. App. 686, where the impediment followed divorce; here it was held, in conformity with the rule above stated, that matrimonial consent after the marriage impediment was removed might be presumed.

[2] See Bissell *v.* Bissell, 55 Barb. 325. *Aliter*, where statutes positively require a ceremonial marriage. See *post*, § 28.

A late interesting Scotch case illustrates the painful uncertainty which hangs about these informal marriages. A baronet of forty, and a bachelor, whose dissolute habits were notorious, had somewhat intimate relations with the family of a man who made fish-tackles. Entertained at the latter's house, on a birthday occasion, with a champagne supper, after which allusion was made by the host to the bad name he was getting with having the baronet so much among his daughters, the titled guest offered to shut people's mouths; he was poor and could not marry now, he said, but would marry after Scotch fashion. Then, kneeling before one of the daughters, a damsel of sixteen, he took a ring from his pocket, placed it upon her third finger, and said to her, "Maggie, you are my wife before Heaven, so help me, O God!" and the two kissed each other. The daughter said "Oh, Major!" and put her arms around his neck. The baronet and the daughter were then "bedded" according to the old Scotch fashion. They lived together for some weeks after this celebration, and met at various times, but there appears to have been no continuous cohabitation. In about thirteen months Maggie had a boy, whom she registered as illegitimate; and, some eighteen months later still, the baronet died. The parties to this hasty and apparently unpremeditated union had not, meantime, represented themselves as husband and wife; and as for the baronet, he denied to others that such relation existed, until, when lying at the point of death in delirium tremens, he seemed doubtfully to admit it. Now, here was an informal marriage, with words of suitable import, solemn and precise, followed by consummation. Supposing this ceremony to have been with marriage intention, there was no reason for disputing its validity; nor, indeed, on the girl's behalf, provided she took all in seriousness, even though the baronet himself jested. To be sure, he might have been maudlin at the moment; on which point, however, the case did not turn. The British House of Lords reversed the decision of the Scotch Court of Sessions, mainly upon circumstantial proof that both parties by behavior subsequent to the ceremony, repudiated its force, and that neither, in fact, had been in earnest. The present issue involved the inheritance of the baronet's estate at some lapse from his death. Both parents of the girl were now dead; the baronet had begotten illegitimate offspring during his life elsewhere; and instead of asserting upon his death, as she might, that this boy was his lawful child, Maggie had at first claimed only a bastard's support for him. Steuart *v.* Robertson, L. R. 2 H. L. Sc 494.

§ 27. **Same Subject; Informal Celebration.** — Words of present promise, in order to constitute an informal marriage, must contemplate a present, not a future, assumption of the status. And herein lies a difficulty: that of discriminating between actual marriage and what we now commonly term an engagement. If the agreement be by words of present promise, — as if the parties should say, "We agree to be henceforth man and wife," — the marriage is perfect. The form of expression is not material.[1] And Swinburne says that though the words should not of themselves conclude matrimony, yet the marriage would be good if it appeared that such was the intent.[2] The proposal of one must be actually accepted by the other; yet such acceptance may be indicated by acts, such as a nod or courtesy. The mutual consent may be expressed orally or in writing.[3] Written promises are of course unnecessary; though the reported cases show frequently letters or other writings interchanged, from which the intent was gathered. And in the celebrated Scotch case of *Dalrymple* v. *Dalrymple*, a marriage promise was established from the successive united acknowledgments of the parties as man and wife, the writings having been preserved by the lady and produced by her at the trial. In this case the principle was sustained, that words importing secrecy or alluding to some future act or public acknowledgment, when superadded to words of present promise, do not invalidate the agreement.[4] More uncertainty arises in matrimonial contracts where a condition inconsistent with marriage is superadded; as if parties should agree to live together as man and wife for ten years; but *bona fide* intent may be fairly presumed where there are no special circumstances to throw light upon the conduct of the parties.[5]

[1] 1 Bish. Mar. & Div. 5th ed. §§ 227, 229; 1 Fras. Dom. Rel 145–149.

[2] Swinb. Spousals, 2d ed. 87.

[3] See Sapp *v.* Newsom, 27 Tex. 537, where marriage by means of mutually executing a bond or contract is sustained under the old law, which was of Spanish origin. But cf. State *v.* Miller, 23 Minn. 352.

[4] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54; 4 Eng. Ec. 485; McInnes *v.* More, Ferg. Consist. Law Rep. 33; Hoggan *v.* Cragie, Maclean & Rob 942.

[5] See 1 Bish. Mar. & Div. 5th ed. §§ 245–250; Currie *v.* Turnbull, Hume, 373; 1 Fras. Dom. Rel. 154. See Hamilton *v.* Hamilton, 9 Cl & F. 327; Hantz

Marriage by words of future promise is consummated when two persons agree to marry at some future period and afterwards actually do cohabit. The foundation of this doctrine is the presumption that the parties meant right rather than wrong, and hence that copulation was permitted on the faith of the marriage promise. But in this class of cases it is requisite that the promise *de futuro* should be absolute and mutual and in good faith. Mere courtship does not suffice, though followed by carnal intercourse.[1] Nor in general do words of promise with immoral conditions annexed. It is admitted that no familiarities short of the copula will convert such loose espousals into matrimony.[2] It is not clear whether cohabitation after *verba de futuro* ever raises a conclusive presumption of marriage at law or not: unquestionably the more reasonable doctrine, however, is that it does not, and that the intent of the parties may be shown as in other cases.[3] But innocence will be inferred, if possible, rather than guilt.[4] So it has been said that where a legal impediment exists to a marriage between persons living in licentious intercourse, as the impediment sinks the status rises.[5] In New York this doctrine of marriage by words *de futuro* is utterly repudiated, and in other States it is maintained quite broadly that all informal marriages were unknown to the English common law.[6] This last has been long a mooted

v. Sealy, 6 Binn. 405; Robertson *v.* Cowdry, 2 West. Law Jour. 191; and in Bish. *supra*. Bissell *v.* Bissell, 55 Barb. 325, shows an interesting state of facts, upon which it was decided that the marriage was valid.

[1] Reid *v.* Laing, 1 Shaw App. Cas. 440; Morrison *v.* Dobson, 8 Scotch Sess. 347, cited 1 Bish. § 253; Breadalbane's Case, L. R. 1 H. L. Sc. 182; Stewart *v.* Menzies, 2 Rob. App. Cas. 547, 591; 1 Fras. Dom. Rel 188; Reg. *v.* Millis, 10 Cl. & F. 534, 780; Peck *v.* Peck, 12 R. I 485; Beverson's Estate, 47 Cal. 621; Dumaresly *v.* Fishly, 3 A. K. Marsh 368; 1 Bish Mar & Div. 5th ed §§ 253–265, and other cases cited; Port *v.* Port, 70 Ill. 484; Schoul. Hus. & Wife, § 38.

[2] 1 Bish. § 253.

[3] See Schoul Hus. & Wife, §§ 40–51, as to breach of promise. Seduction under breach of promise does not constitute a marriage. See, too, Morrison *v.* Dobson, 8 Scotch Sess. 347.

[4] See Cheney *v.* Arnold, 15 N. Y. 345; Duncan *v.* Duncan, 10 Ohio St. 181; and comments of Mr. Bishop, §§ 255–258; Reg. *v.* Millis, 10 Cl. & F. 534; Swinb. Spousals, 2d ed. 225, 226; Robertson *v.* State, 42 Ala. 509.

[5] 1 Bish. Mar & Div 5th ed. § 248; De Thoren *v.* Attorney General, 1 H. L App 686

[6] Cheney *v.* Arnold, 15 N. Y. 345. But see Bish. §§ 255–258; Bissell *v.* Bissell, 55 Barb. 325. And see Denison *v.* Denison, 35 Md. 361; Holmes *v.*

point in the courts, and will ever remain so; but whatever may have been the historical fact, certain it is that the necessity of a more formal observance of marriage has been almost universally recognized; and the very words, "marriage in the sight of God," so familiar to the readers of the Scotch matrimonial law, not only import the peculiar embarrassments which attend the justification of such loosely contracted alliances before the world, but attest the solemn character of this institution.[1]

§ 28. **Same Subject; Formal Celebration.** — (2) All the learning of informal marriages, if there was ever much of it, was swept out of the English courts when formal religious celebration was prescribed by positive statute. Ceremonials had long been required by those canons upon which the ecclesiastical law was based. Lord Hardwicke's Act, passed in the reign of George II.,[2] is the most famous of these statutes. This act required all marriages to be solemnized in due form in a parish church or public chapel, with previous publication of the banns; and marriages not so solemnized were pronounced void, unless dispensation should be granted by special license. Some harsh provisions of this act were relaxed in the reign of George IV., but soon re-enacted.[3] More recent legislation permits of a civil ceremonial before a register, to satisfy such as may have conscientious scruples against marriage in church.[4] Such, too, is the general tenor of legislation in this country; the law justly regarding civil observances and public registration sufficient for its own purposes, while human nature clings to the religious ceremonial.[5]

Holmes, 1 Abb. (U. S.) 525; Duncan *v.* Duncan, 10 Ohio St. 181; Port *v.* Port, 70 Ill. 484. The opinion of Lord Stowell, in the case of Dalrymple *v.* Dalrymple, to which we have alluded, is an admirable exposition of the law of informal marriages. It is a masterpiece of judicial eloquence and careful research.

[1] For a case arising on an indictment against a man for cohabiting with a woman without formal marriage, but under a special contract for a life-union and joint accumulation of property and care of children, see State *v.* Miller, 23 Minn. 352. And see Commonwealth *v.* Munson, 127 Mass. 459. See, further, Schoul. Hus. & Wife, §§ 38, 39.

[2] 26 Geo. II. c. 33 (1753).

[3] 3 Geo. IV.; 4 Geo. IV. c. 76.

[4] See 6 & 7 Will. IV. c. 85, & c. 88; 7 Will. IV., and 1 Vict. c. 22, and 3 & 4 Vict. c. 92.

[5] See 2 Kent Com. 88–90; 1 Bish. Mar. & Div. 5th ed. § 279.

Either celebration before a clergyman or with the participation of some one of such civil officers as the statute may designate is therefore at the option of parties choosing at the present day to marry. This is the law of England and America. And the only controversies ever likely to occur in our courts would be where the language of the statutes in some particular State left it doubtful whether marriages celebrated informally were to be considered absolutely null. It is to be borne in mind that Lord Hardwicke's Act is of too recent a date to be considered as part of our common law. Was, then, marriage *in facie ecclesiæ* essential in England before the passage of this act? It is admitted that the religious marriage celebration was customary previous to the Reformation. It is further allowed that the church, centuries ago, created an impediment, now obsolete, called "precontract," the effect of which was that parties engaged to be married were bound by an indissoluble tie, so that either one could compel the other to submit at any time to the ceremonial marriage. But whether precontract rendered children legitimate, and carried dower, curtesy, and the other incidents of a valid marriage, is not clear. In 1844 the question, whether at the common law a marriage without religious ceremony was valid, went to the English House of Lords, and resulted in an equal division.[1] And, curiously enough, such was the fate of a similar case in this country before the highest tribunal in the land.[2] So that we may fairly consider the law on this point as for ever unsettled.[3]

[1] Reg. *v.* Millis, 10 Cl. & F. 534.

[2] Jewell *v.* Jewell, 1 How. (U. S.) 219.

[3] See full discussion of this question, with authorities, in note to 2 Kent Com. 87; also in 1 Bish. Mar. & Div. §§ 269–282; Cheney *v.* Arnold, 15 N. Y. 345. The American doctrine is, that the intervention of one *in holy orders* was not essential at common law. This is the view of Chancellor Kent, Judge Reeve, and Professor Greenleaf, as expressed in their respective text-books; also the general current of American decisions. Mr. Bishop confirms these conclusions while suggesting new reasons for such an American doctrine; as, for instance, that in these colonies the attendance of one in holy orders, and more especially of an ordained clergyman of the established church, could not always be readily procured. See 1 Bish. Mar. & Div. 5th ed. §§ 279–282, and decisions collated; 2 Kent Com. 87; Reeve Dom. Rel. 195 *et seq.*; 2 Greenl. Ev. § 460.

But in several States the contrary is declared to be the common law.

Among most nations and in all ages has the celebration of marriage been attended with peculiar forms and ceremonies, which have partaken more or less of the religious character. Even the most barbarous tribes so treat it where they hold to the institution at all. The Greeks offered up a solemn sacrifice, and the bride was led in great pomp to her new home. In Rome, similar customs prevailed down to the time of Tiberius. Marriage, it is true, degenerated afterwards into a mere civil contract of the loosest description; parties being permitted to cohabit and separate with almost equal freedom.[1] The early Christians, there is reason to suppose, treated marriage as a civil contract; yielding, perhaps, to the prevailing Roman law. Yet the teachings of the New Testament and church discipline gave peculiar solemnity to the relation. And religious observances must have prevailed at an early date, for in process of time marriage became a sacrament. In England, centuries later, it needed only Lord Hardwicke's Act to apply statute law to a universal practice; for although, in the time of Cromwell, justices of the peace were permitted to perform the ceremony, popular usage by no means sanctioned the change. Informal marriages are uncommon even in Scotland, where the civil law prevails. In our own country it is not surprising that local jurisprudence should have exhibited some signs of reaction against ancient canon and kingly ordinance. Yet, even with us, the almost universal custom repudiates informal and civil observances; and, secured in the privilege of choosing prosaic and business-like methods of procedure, Christian America yields its testimony in favor of marriage *in facie ecclesiæ*.[2]

1 Bish. *ib.* And statutory forms are declared requisite, and the doctrines of informal marriage denied more or less emphatically, as the foregoing pages have shown. *Supra*, § 26, note.

[1] Smith's Dict. Antiq. "Marriage;" *supra*, Part I.

[2] See 2 Kent Com. 89, and authorities cited.

We do not mean to imply that marriage is a sacrament, or that religious ceremonies are essential to its due observance. We are speaking only of the universal testimony as to the fitness of peculiar and in general religious observances. Judge Reeve, exhibiting his contempt for "Popish" practices, says, "There is nothing in the nature of a marriage contract that is more sacred than that of other contracts, that requires the interposition of a person in holy orders, or that it should be solemnized in church." Reeve Dom. Rel. 196. At the time he wrote, was

§ 29. **Same Subject; Formal Celebration.** — But, out of consideration for what may be termed the public, or natural and theoretical law of marriage, many American courts have, to a very liberal extent and beyond all stress of necessity, upheld the informal marriage against even legislative provisions for a formal celebration. Marriage being a matter of common right, it is lately held by the highest tribunal for harmonizing the rule of States, that, unless the local statute which prescribes regulations for the formal marriage ceremony positively directs that marriages not complying with its provisions shall be deemed void, the informal marriage by words of present promise must be pronounced valid, notwithstanding statutory directions have been disregarded.[1]

Whether we must absolutely accept this doctrine, or not, in its full pernicious extent, and thus put legislators to the use of express words of nullity in statutes which might otherwise as well have been omitted, the main purpose of enforcing upon civilized and populous communities marriage rites appropriate to so solemn an institution being surely desirable, it will be readily conceded that English and American tribunals tend, in construing the marriage acts, to uphold every marriage, if possible, notwithstanding a non-compliance with the literal forms. And this is right; for while formal celebration is a shield to honest spouses and their posterity, rigor in the details of form, especially in inconvenient or trivial details, or those which it is incumbent rather upon third persons to respect, exposes them to new dangers. Thus is it as concerns place;[2] and as to the due proclamation of banns, collateral points concerning ecclesiastical authority are inappropriate.[3] And though the parties may have failed to ob-

not the practice prevailing in New England contrary to his theory, as it was before and as it remains still? And who has ever proposed in modern times to perform a business contract in church?

[1] Meister *v.* Moore, 96 U. S. 76, citing this as the rule in Michigan; Hutchins *v.* Kimmell, 31 Mich. 128; Londonderry *v.* Chester, 2 N. H. 268.

[2] Queen *v.* Cresswell, 1 Q. B. D. 446. And see Stallwood *v.* Tredger, 2 Phillim. 287.

[3] See Hutton *v.* Harper, 1 H. L. App. 464; Sichel *v.* Lambert, 15 C. B. N. S. 781; Prowse *v.* Spurway, 26 W. R. 116; Cannon *v.* Alsbury, 1 A. K. Marsh. 76; Askew *v.* Dupree, 30 Ga. 173; Blackburn *v.* Crawfords, 3 Wall. 175; Holmes *v.* Holmes, 6 La. 463; Stevenson *v.* Gray, 17 B. Monr. 193.

serve certain formalities of license or registry, their marriage will generally be held good in both England and this country, even though the magistrate or clergyman be subject himself to a penalty for the irregularity.[1] On the other hand, our ceremonial statutes of marriage, which require fulfilment at all, must, in fundamental respects at all events, be complied with. Thus, the essence of formal marriage seems to consist in the performance of the ceremony by or in the presence of a responsible third person. And hence, unless parties can take refuge in natural law and an informal marriage, they are not permitted to tie their own knot.[2]

§ 30. **Consent of Parents and Guardians.** — The consent of parents and guardians is one of those formalities which marriage celebration acts now commonly prescribe in the interest of society, as they do banns or the procurement of a license generally for better publicity. Such consent was not necessary to perfect a marriage at the common law. But Lord Hardwicke's Act made the marriage of minors void without consent of parents or guardians first obtained.[3] This proved intolerable. A *bona fide* and apparently regular marriage was in one instance set aside, after important rights had intervened, for no other cause than that an absent father, supposed to be dead, but turning up unexpectedly, had failed to bestow his permission, and the mother had acted in his stead.[4] Gretna Green marriages, on Scotch soil, became the usual recourse for children with unwilling protectors.[5] Hence the law was afterwards modified, so that, without the requisite consent, marriages, although forbidden, might remain

[1] Upon this point see further, Schoul. Hus. & Wife, § 35, and cases cited; 1 Bish. Mar. & Div. §§ 283, 287.

[2] Commonwealth *v.* Munson, 127 Mass. 459. And see Milford *v.* Worcester, 7 Mass. 48. But in Beamish *v.* Beamish, 1 Jur. N. S. Part II. 455, it was held in Ireland that a clergyman might marry himself. See 1 Bish. § 289.

[3] 26 Geo. II. c. 33. See 2 Kent Com. 85; Rex *v.* Hodnett, 1 T. R. 96; 1 Bish. Mar. & Div. 5th ed. §§ 293–295, and cases cited.

[4] Hayes *v.* Watts, 2 Phillim. 43.

[5] Stat. 19 & 20 Vict. c. 96, to stop these runaway matches, enacts that no irregular marriage contracted in Scotland shall be valid unless one of the parties had his or her usual residence in Scotland, or lived there for 21 days preceding the marriage. Lawford *v.* Davies, 39 L. T. N. S. 111.

valid ;[1] and these features are found to characterize the marriage acts in the different States of this country.[2] Clandestine marriages are doubtless to be discouraged, and the law will willingly inflict penalties upon clergymen, magistrates, and all others who aid the parties in their unwise conduct, the penalty serving in a measure as indemnification to the parent or guardian; but experience shows that legislation cannot safely interpose much farther.[3]

Under such statutes (which, however, vary in language and scope in different States) it has been held that if a minor has both parent and guardian, the guardian should consent in preference; though it might appear more proper to consider which has the actual care and government of the minor. One who has relinquished the parental control cannot sue for the penalty; but a father's unfitness is not pertinent to the issue of uniting his minor child in marriage without his leave, nor ground for accepting the mother's sole consent instead. In this class of statutes the minister or magistrate who has made himself amenable to the law cannot in general defend on the plea that he acted in good faith. The expression of consent is in some States made a prerequisite to granting the marriage license.[4]

§ 31. **Legalizing Defective Marriages; Legislative Marriage.** — Defective marriages, we may further observe, have in some instances been legalized by statute; as where parties within the prohibited degrees of consanguinity or affinity have united. So with marriages before a person professing to be a clergyman or justice of the peace, but without actual

[1] Rex *v.* Birmingham, 8 B. & C. 29; Shelf. Mar. & Div. 309–322; Stat. 4 Geo. IV. c. 76.

[2] 1 Bish. Mar. & Div. §§ 341–347, and cases cited; Smyth *v.* State, 13 Ark. 696; Wyckoff *v.* Boggs, 2 Halst. 138; Bollin *v.* Shiner, 2 Jones (Pa.), 205. And see Wood *v.* Adams, 35 N. H. 32; Kent *v.* State, 8 Blackf. 163; Askew *v.* Dupree, 30 Ga. 173; Fitzpatrick *v.* Fitzpatrick, 6 Nev. 63; Adams *v.* Cutright, 53 Ill. 361; State *v.* Dole, 20 La. Ann. 378. The language of some statutes leaves the point in doubt as to whether marriage without the consent of parents renders the marriage void, or only subjects offending parties, including the person who performs the ceremony, to a penalty. But the latter is, of course, to be presumed rather than the former.

[3] See further, Schoul. Hus. & Wife, § 36.

[4] Schoul. Hus. & Wife, § 36.

authority. On principle, in fact, there seems no reason to doubt that any government, through its legislative branch, may unite a willing pair in matrimony, as well as pass general laws for that purpose.[1] But though legislative divorces are not unfrequent, a legislative marriage is something unknown, not to say uncalled for. And in this country, questions of fundamental constraint under a written constitution might arise, even where the cure only of a defective marriage was sought by the legislature; inasmuch as the intervening rights of third persons might thereby be prejudiced.[2]

§ 32. **Restraints upon Marriage.** —The policy of restraining marriage is treated with disfavor by our law, which on the contrary seems disposed to encourage the institution, though not to the extent practised by some countries of openly promoting its observance, or forcing private inclination in the conjugal direction. Numerous cases, those particularly which construe the provisions of testamentary trusts, have laid it down that the general restraint of marriage is to be discouraged. Accordingly a condition subsequent, annexed by way of forfeiture to a gift, legacy, or bequest, in case the donee or legatee should marry, will be held void and inoperative, as a restraint upon marriage, and so as to both income and capital.[3] But marriage and remarriage are differently viewed in this respect; and it is well settled that forfeiture by condition subsequent in case a widow shall marry again must be upheld as valid, whether that widow be the beneficiary through her husband or some other person. Does the latter rule apply equally to widow and widower, woman and man? Upon full consideration the English chancery held a few years ago, on appeal (reversing the decision of the lower tribunal), that it does.[4]

[1] Brunswick *v.* Litchfield, 2 Greenl. 28; Moore *v.* Whittaker, 2 Harring. 50; Goshen *v.* Richmond, 4 Allen, 458; 1 Bish. Mar. & Div. 5th ed. §§ 657–659. As to the effect of a Texas statute, which relaxed old requirements in legalizing an irregular marriage, see Rice *v.* Rice, 31 Tex. 174.

[2] As to the proof of a marriage and legal presumptions, see 1 Bish. Mar. & Div. 5th ed. § 432 *et seq.*; Schoul. Hus. & Wife, §§ 38, 39.

See also promises to marry, Schoul. Hus. & Wife, §§ 40–51.

[3] See Bellairs *v.* Bellairs, L. R. 18 Eq. 510, and cases cited.

[4] Allen *v.* Jackson, 1 Ch. D. 399, reversing s. c. L. R. 19 Eq. 631. See

The latest English decisions, on the whole, do not strenuously resist these restraints upon marriage in testamentary trusts.[1] And it is doubtful whether the rule discouraging restraint of marriage can extend to devises of land; though on principle there should be no distinction between devises and gifts or bequests in this respect.[2]

CHAPTER II.

EFFECT OF MARRIAGE; PERSON OF THE SPOUSE.

§ 33. **Effect of Marriage; Order of Legal Investigation.** — When the parties to a lawful marriage have once completed the ceremony, or, as it is said, have executed the contract of marriage, they are admitted into the marriage relation, and their mutual rights and obligations become at once bounded, protected, and enforced by the general law of husband and wife. What that law is will constitute the topic of discussion in this and succeeding chapters of this part. We have already alluded to the confusion and uncertainty which exist at the present day, and particularly in many of the United States, in the law of husband and wife, owing to the

opinion of James, L. J., and authorities cited; this interesting point being thus raised for the first time.

Rights are equal as to marrying again, so far as widow and widower are concerned, as all will readily admit. The lower court was probably influenced by considerations which medical men adduce, showing that marriage is more essential to a man's continuous well-being than a woman's, and that a widow, on the whole, is less likely to have sufficient reason for marrying again than a man. But this argument, if sound, is perhaps far-fetched, and James, L. J., on appeal, treated the subject more from the aspect of equal rights, as between the sexes, in the disposal of property. No act of parliament or decision of a court, he observed, established any distinction here between the second marriage of man or woman, and he knew of no reason for making it.

[1] It is held that a gift to one's widow on condition that she retire immediately into a convent is upon a good condition precedent. Duddy *v.* Gresham, 39 L. T. N. S. 48. Also, that it is a good condition subsequent which forfeits a gift to one's brother in case he marries "a domestic servant," or one of lower degree, degrading his own family. Jenner *v.* Turner, 29 W. R. 99.

[2] Jones *v.* Jones, 1 Q. B. D. 279.

transition period through which we seem to be passing from the marriage relation of the common law to that known to the civil law.[1] Our subject will be most conveniently treated by taking up the common-law doctrine first, and thoroughly examining its principles; then passing to the modern or civil-law doctrine for discussion in like manner. First, then, the rights and disabilities of marriage on the coverture scheme; secondly, the rights and disabilities of marriage on the separate existence scheme, or with the innovations which equity and modern statutes have made.

But since these rights and disabilities have varied little, except as to the wife's property, we may here investigate those general principles of the common law which concern the person of the spouse, once and for all.

§ 34. **Person of the Spouse; Coverture Principle; Husband Head of Family.** — The general principle of coverture, as defined by Blackstone and other common-law writers, is this: that by marriage the husband and wife become one person in law; that is to say, the very being or legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband, under whose wing, protection, and *cover* she performs everything; and is therefore called in the law-French a *feme covert*, *fœmina viro co-operta;* is said to be *covert-baron*, or under the protection and influence of her *baron* or lord; and her condition during her marriage is called her *coverture*.[2] For this reason the term applied to the relation of husband and wife in the old books is *baron and feme*. Upon this fundamental principle depend, at the common law, the general rights, duties, and disabilities of marriage. But this very definition shows inaccuracy, to say nothing of unfairness of application. Here are two conflicting notions: one that the existence of the wife is actually lost or suspended; the other that there is still an existence, which is held in subordination to the will of her lord and master, which last the word *coverture* fitly expresses. It will appear in fact that while some of the wife's disabilities

[1] See Introductory, §§ 4–8.

[2] 1 Bl. Com. 442; Co. Litt. 112; 2 Kent Com. 129.

seem based upon the one notion, others are based upon the latter, and probably more correct one. The wife's disabilities are deemed by Blackstone "for the most part intended for her protection and benefit." And he adds, by way of rhetorical period, "so great a favorite is the female sex of the laws of England!" a proposition which his commentators have gravely proceeded to dispute and dissect, and, it must be added, not without good success.[1]

The husband's right of dominion is therefore fully recognized at the common law. And never was the English doctrine, despite its failings, set forth in more terse and forcible language than in the words of Sir Thomas Smith: "The naturalest and first conjunction of two towards the making a further society of continuance is of the husband and wife, each having care of the family: the man to get, to travel abroad, and to defend; the wife to save, to stay at home, and to distribute that which is gotten for the nurture of the children and family; which to maintain God has given the man greater wit, better strength, better courage, to compel the woman to obey by reason or force; and to the woman beauty, fair countenance, and sweet words, to make the man obey her again for love. Thus each obeyeth and commandeth the other; and they two together rule the house so long as they remain in one."[2]

In accordance with these principles, and perhaps, too, the laws of nature and divine revelation, the husband is the head of the family, and *dignior persona*. As to the more strictly personal consequences of the marriage union, his rights and duties have suffered no violent change at our modern law. It is for the wife to love, honor, and obey: it is for the husband to love, cherish, and protect. The husband is bound to furnish his wife with a suitable home; to provide, according to his means and condition of life, for her

[1] 1 Bl. Com. 445, notes by Christian, Hargrave, and others. It is probable that Blackstone used this expression in a strain of playful gallantry, not uncommon with lecturers. Even Chancellor Kent's observations are not free from suspicion. See 2 Kent Com. 182, closing sentence at foot of the page.

[2] Commonwealth of England, Book 1, ch. 2, quoted in Bing. Inf. & Cov. p. 184.

maintenance and support; to defend her from personal insult and wrong; to be kind to her; to see that the offspring of their union are brought up with tenderness and care; and generally to conduct himself, not according to the strict letter of the matrimonial contract, but in its spirit. So long as he does this, his authority is acknowledged at the common law; and if the wife's wishes and interests clash with his own, she must yield.[1]

§ 35. **Duty of Spouses to Adhere or Live Together.** — Marriage necessarily supposes a home and mutual cohabitation. Each party has therefore a right to the society of the other. They married to secure such society. And the obligation rests upon both to live together — or, as the expression sometimes goes, *to adhere*. This is the universal law.[2] Its observance is essential to the mutual comfort of husband and wife, and the well-being, if not the existence, of their children. But to this rule there are obvious exceptions. The wife is not bound to live with her husband where he is imprisoned, or has otherwise ceased to be a voluntary agent and to perform the duties of a husband. Nor if he is banished. For marriage does not force the parties to share the punishment of one another's crimes. This was the rule of the civil as it is that of the common law.[3] And in general such causes as would justify divorce in any State justify the innocent party in breaking off matrimonial cohabitation likewise. But partial and temporary separation for purposes connected with the husband's profession or trade — as, for instance, where he is an army officer — constitutes no breach of the marriage relation unless continued beyond necessary and reasonable bounds, or accompanied by negligence to provide, while absent, for the maintenance of wife and family. And under some other circumstances cohabitation may be properly al-

[1] Lord Stowell observes that the law intrusts the husband not only with a certain degree of care and protection, but also "with authority over his wife. He is to practise tenderness and affection, and obedience is her duty." Oliver *v.* Oliver, 1 Hag. Con. 361; 4 Eng. Ec. 429.

[2] 1 Fras. Dom. Rel. 447, 452.

[3] Co. Litt. 133; 1 Bl. Com. 443; 1 Fras. Dom. Rel. 448; 2 Kent. Com. 154.

lowed to cease for a time without involving the breach of marital obligations.[1]

§ 36. **Breach by Desertion, &c.; Duty of making Cohabitation Tolerable.** — This subject is most commonly considered where redress is sought because one or the other party deserts; such desertion formerly calling for the restitution of conjugal rights, but in these days furnishing rather a cause of divorce to the injured spouse, not to speak of the enlargement of an abandoned wife's rights and responsibilities, despite the rules of coverture. These matters, and particularly divorce for desertion, are found duly considered in other books, and the duty of matrimonial adherence more fully developed.[2] We observe here that, in conformity to the world's customs and general principle, it is the wife's actual withdrawal from home which admits the less readily of a justifying explanation, and exposes the pair to scandal.[3] But the husband may be at fault by making the home unfit for an honest wife to occupy with dignity, or by turning his wife out, or even by encouraging her to leave it when it was right that she should remain.[4] It happens often that the husband instead forsakes the home, leaving the wife in it, such withdrawal being rightful or wrongful according to the circumstances.[5]

Mere frailty of temper on a wife's part, not shown in marked and intolerable excesses, would hardly justify a husband in withdrawing the protection of his home and society.[6] But it is held that the wife's violent and outrageous behavior justifies a husband in seeking divorce from bed and board, and, seemingly, in leaving her.[7] The moral duty of living together involves, doubtless, the reciprocal obligation of making that life agreeable, according to the true status of the married parties; but the extent of the

[1] See 2 Kent Com. 181; 1 Fras. Dom. Rel. 240 *et seq.*; *Ib.* 447; Chretien *v.* Husband, 17 Martin (La.), 60.

[2] See Separation, Divorce, *post;* 1 Bish. Mar. & Div. §§ 771–810.

[3] *Ib.*; Starkey *v.* Starkey, 21 N. J. Eq. 135.

[4] McCormick *v.* McCormick, 19 Wis. 172.

[5] McClurg's Appeal, 66 Penn. St. 366. See, as to divorce for desertion, Schoul. Hus. and Wife, §§ 515–523.

[6] Yeatman *v.* Yeatman, L. R. 1 P. & D. 489.

[7] Lynch *v.* Lynch, 33 Md. 328.

legal duty is not so easily definable. Upon the point of redress, in fact, codes widely differ; the practical difficulty being, under our laws, that married spouses have little remedy until it comes to the last extremity of divorce.[1] Manifestations of bad temper on one side must necessarily weaken the duty of adherence on the other; extreme cruelty, or cruel and abusive treatment, is now frequently made a legal cause of divorce; yet, at the same time, mutual forbearance and self-sacrifice are essential to the well-being of every household; marriage, when rightly considered, working a harmony of character by the constant attrition to which the two natures are exposed.

Under this head we may add that the duty of cohabitation or adherence is not fulfilled by literal or partial compliance. Thus the refusal of sexual intercourse and the nuptial bed, without good excuse, is a serious wrong which husbands, at all events, are disposed to construe into justifying ground for divorce.[2] Living in the same house, but wilfully declining matrimonial intimacy and companionship, is *per se* a breach of duty, tending to subvert the true ends of marriage. So, too, a husband who unreasonably withdraws cohabitation from his wife may be deemed guilty of legal desertion, even though he continue to support her.[3] But sexual intercourse, the use of the same chamber, or the occupation of the same bed, should be mutually regulated with considerations of health as well as kindly forbearance; and a husband who wantonly abuses his wife so as to inflict needless pain and injury upon her, and disregards her health and delicate organization, is guilty of legal cruelty.[4]

§ 37. **The Matrimonial Domicile.** — As there must be a home, so there is also a matrimonial domicile of the parties recognized by universal law. And the husband, as *dignior persona*, has the right to fix it where he pleases. The wife's domicile merges in that of her husband. Grotius says:

[1] See, as to divorce for cruelty, Schoul. Hus. & Wife, §§ 507–514.

[2] See Schoul. Hus. & Wife, § 528; Southwick *v.* Southwick, 97 Mass. 327; 1 Bish. Mar. & Div. 5th ed. § 778.

[3] Yeatman *v.* Yeatman, L. R. 1 P. & D. 489.

[4] *Ib.*; Moores *v.* Moores, 1 C. E. Green, 275. See Shaw *v.* Shaw, 17 Conn. 189, criticised in 1 Bish. § 760.

"*De domicilio constituere jus est marito.*"[1] But this applies only to the real domicile of the husband; not to a fictitious place of residence which he may take up for a special purpose, or as an involuntary agent. In a genuine sense the domicile of the husband becomes that of the wife, and wherever he goes she is bound to go likewise; not, however, unless his intent be *bona fide* and without fraud upon her person or property rights.[2] In certain cases the wife may perhaps be said to acquire a domicile or legal forum for divorce and similar purposes.[3] But the exception, if it exist, is limited by the necessity. To a wife living apart from her husband, no separate domicile is conceded for testamentary purposes.[4] Nor does a change of the wife's abode change the husband's or the matrimonial domicile.[5]

§ 38. **Same Subject; Husband's Right to establish Domicile.** — Any contract, therefore, which the husband may make with his wife or her friends, before marriage, not to take her away from the neighborhood of her parents, is void. Public policy repudiates all contracts in restraint of such marital rights. There might be circumstances under which such a promise would be reasonable, but at best it can create a moral obligation only. The husband has the right to establish his domicile at any time, wherever he pleases, and the wife must follow him through the world.[6] If she refuses to go with him, his own conduct being upright and honorable in the premises, she places herself in the wrong, and while she persists he is not bound to support and maintain her.[7]

But the courts of our day hesitate to apply a rule so apparently harsh as that announced in the last sentence. With the increasing regard for female privileges has grown up a

[1] 2 Kent. Com. 181; 1 Fras. Dom. Rel. 240 *et seq.*; *Ib.* 447.

[2] 1 Fras. Dom. Rel. 447, 448; 1 Burge Col. & For. Laws, 260; Wharton Confl. Laws, §§ 43–47. See Von Hoffman *v.* Ward, 4 Redf. Surr. 244; King *v.* Foxwell, 3 Ch. D. 518; Schoul. Hus. & Wife, § 60. And see elementary works on Domicile.

[3] See Divorce, *post.*

[4] Paulding's Will, 1 Tuck. (N. Y.) 47.

[5] Porterfield *v.* Augusta, 67 Me. 556; Scholes *v.* Murray Iron Works Co., 44 Iowa, 190; Johnson *v.* Johnson, 12 Bush, 485.

[6] Hair *v.* Hair, 10 Rich. Eq. 163; McAfee *v.* Kentucky University, 7 Bush, 135.

[7] Babbitt *v.* Babbitt, 69 Ill. 277.

strong disposition to reduce the husband's right over the matrimonial domicile to a sort of *divisum imperium*. The question is not new, whether reasonable exceptions to this rule may not exist; as, for instance, where the husband proposed to take the wife into an enemy's country while war was waging, or on a journey perilous to her life.[1] Such exceptions may be justified, it is generally admitted, on the ground that the wife would be thereby exposed to bodily harm. But, whether the apprehension be that of personal violence, or ill health from the fatigue of a journey or the change of climate, little favor seems to have been shown to the wife either at the English or Scotch law, unless the circumstances rendered a change of domicile on her part equivalent to a moral suicide.[2] At the present day, a rule less stringent would doubtless be applied. A husband would not be permitted to remove his wife to some remote and undesirable place for the sake of punishing or tormenting her, or so as to compel her to stay alone where he did not mean to reside himself; for this would not be fixing the matrimonial domicile with honest intent. Nay, more, there are several recent decisions in this country which point to an obligation on the husband's part to show reasonable cause why his wife should follow him when he changes his abode.[3]

This later uncertainty in the law is unfortunate. Where a pair disagree in the choice of a home, either the right of decision must belong to one of them, or the court should sit as umpire. No one has suggested that the wife should choose the domicile, nor can judicial interference be well called in, except to divorce the parties. Yet, without a home in common, of what avail is matrimony? We cannot but regret that any of our courts should seem to legalize domestic discord; that there should be good American authority to sanction the wife's refusal to accompany her husband on any such trivial pretext as "the dislike to be near his relatives."[4] Perhaps,

[1] Boyce *v.* Boyce, 23 N. J. Eq. 337.

[2] See 1 Fras. Dom. Rel. 448.

[3] Bishop *v.* Bishop, 30 Penn. St. 412; Gleason *v.* Gleason, 4 Wis. 64; Powell *v.* Powell, 29 Vt. 148. See Moffatt *v.* Moffatt, 5 Cal. 280; Cutler *v.* Cutler, 2 Brews. (Pa.) 511.

[4] Powell *v.* Powell, 29 Vt. 148.

however, the harsh remedy usually sought to be applied in modern cases — divorce for the wife's wilful desertion — may tempt our tribunals to relax the old doctrine of conjugal obedience for her benefit. For, after all, the decision is in favor of prolonging the marriage relation.[1]

§ 39. **Domicile relative to Alien and Citizen.** — As corollary of the general proposition already announced, it is held that an alien woman marrying with a citizen of the United States becomes, by virtue of such marriage, a citizen also, with the usual capacity as to purchase, descent, and inheritance;[2] and that of aliens intermarried, if the husband becomes a naturalized citizen, the wife in like manner is naturalized, even though she has not yet migrated from her native country.[3]

§ 40. **Change of Wife's Name by Marriage.** — Marriage at our law does not change the man's name, but it confers his surname upon the woman. Until a decree of divorce, giving a married woman leave to resume her maiden name, goes into full effect, or widowhood is succeeded by a new marriage and another husband, she goes by her former husband's surname. This is English and American usage. And with this actual marriage name, it would appear that a wife can only obtain another name by reputation.[4] But in consideration

[1] The English rule as to the wife's duty of adherence still continues strict. A wife petitioned for divorce on the ground of her husband's desertion. The facts showed that shortly after her marriage she went with her husband to Jamaica, where he held an appointment from which he derived not more than £100 a year, and in consequence of his slender income she had to put up with some hardship. Her health suffered, and in less than a year, namely, in 1846, she returned to England. Her husband continued abroad, during the greater part of the time at Jamaica, where he succeeded in getting a more lucrative appointment. When she left him for England he acted kindly to her, promised to allow her £30 a year, but made no arrangement for a permanent separation. Their correspondence continued until 1851, when the husband asked her to return, and provided funds for her passage, but she wrote that her health would not permit her to do so. Here all correspondence and intercourse ceased until 1856, when an allowance was again effected through the intervention of a relative; this the husband continued until 1860, and then stopped it. He appears to have led a loose life after the wife's refusal to return. The court held that these circumstances did not constitute desertion on the husband's part, nor entitle her to divorce. Keech *v.* Keech, L. R 1 P. & D. 641 (1868). Adultery being proved, however, divorce was granted on that ground.

[2] Lubrs *v.* Eimer, 80 N. Y. 171; Kelly *v.* Owen, 7 Wall. 496.

[3] Kelly *v.* Owen, 7 Wall. 496; Headman *v.* Rose, 63 Ga. 458.

[4] Fendall *v.* Goldsmied, 2 P. D. 263.

of the rule that a person has the right to be known by any name he or she chooses, proceedings under the assumed name of a married woman have been upheld after judgment.[1]

§ 41. **Right of one Spouse to the other's Society; Suit for Enticement.** — Each spouse is entitled to the society and companionship of the other. Inasmuch as the husband is thus entitled, he may recover his wife from any person who would withhold or withdraw her from him. This is a well-understood principle the world over.[2] And the common law gives him the right to sue for damages all persons who seek to entice her away.[3] But in such cases malice and improper motive are always to be considered; and parents and near relatives stand on a different footing from strangers. So is the previous conduct of the husband towards his wife a material element to be considered; since this, and not the interference of others, may have occasioned the separation. It is one thing to actively promote domestic discord, but quite another to harbor, from motives of kindness and humanity, one who seeks shelter from the oppression of her own lawful protector.

Yet such conduct, whatever the motives, is, on the part of strangers, exceedingly perilous, generally open to misconstruction, and never to be encouraged. They should leave the parties to their lawful remedies against one another. With parents it is different. There are several cases in the American reports where a father is not only held to be absolved from liability for sheltering his daughter, who has fled from a drunken and profligate husband, but even stimulated to do so. "A father's house," says Chancellor Kent, "is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum."[4] But this does not justify even a parent

[1] Clark *v.* Clark, 19 Kans. 522.

[2] 1 Fras. Dom. Rel. 240, 241.

[3] 1 Chitty Pleading, 91; Hutcheson *v.* Peck, 5 Johns. 196; Friend *v.* Thompson, Wright, 636; Rabe *v.* Hanna, 5 Ham. 530; Bennett *v.* Smith, 21 Barb. 439; Barnes *v.* Allen, 30 Barb. 663.

[4] Hutcheson *v.* Peck, 5 Johns. 196. See also Friend *v.* Thompson, Wright, 636; Bennett *v.* Smith, 21 Barb. 439; Smith *v.* Lyke, 20 N. Y. Supr. 204; Payne *v.* Williams, 4 Baxt. 583.

in hostile interference against the husband; for the latter's rights are still superior; and the father must give up his daughter, and the marriage-offspring, whenever she wishes to return, unless the proper tribunal has decreed otherwise; though he might, we suppose, by fair arguments, urged to promote her true good, seek to dissuade her from returning. The legal doctrine seems to be this, that honest motives may shield a parent from the consequences of indiscretion, while adding nothing to the right of actual control; the intent with which the parent acted being the material point, rather than the justice of the interference; that a husband forfeits his right to sue others for enticement, where his own misconduct justified and actually caused the separation; but that otherwise his remedy is complete against all persons whomsoever, who have lent their countenance to any scheme for breaking up his household.[1]

Differences of sex may account for a denial of the enticement suit to the wife, though her right to her husband's society is unquestionable. Woman claims protection where man acts for himself. Hence it is held that a wife cannot, either at common law, or under statutes not clearly enabling her, maintain an action against a third person for having, by wrongful acts, advice, and persuasion, induced her husband to abandon and become separate from and cease to maintain her.[2]

[1] A curious case of this sort came before the Supreme Court of North Carolina in 1849. The defendant had enticed away the wife of the plaintiff. The two afterwards entered into an agreement that the defendant should keep the plaintiff's wife and child at his own home, and should raise, educate, and provide for the child by appropriating the portion of property formerly intended for the mother's provision; that he should not be liable for having enticed the wife away; and that the plaintiff might visit his wife and child not exceeding four or five days at a time. The wife was not made a party to the contract, though it appears to have been made with her approval. The plaintiff afterwards rescinded the agreement, demanded his wife, and, upon refusal of the defendant to give her up, sued him in damages. The court sustained him; pronouncing the contract to be "neither in form or substance a contract for a separation, but simply a license to harbor the wife and child, securing the defendant against any legal responsibility for so doing until withdrawn." And it was further intimated that such a contract was absolutely void as against public policy. Barbee *v.* Armstead, 10 Ired. 530. See also 1 Burge Col. & For. Laws, 238, for a like doctrine at the civil law.

[2] Van Arnam *v.* Ayers, 67 Barb. 544. But see Breman *v.* Paasch, 7 Abb. (N. Y.) N. Cas. 249.

§ 42. **Husband's Duty to Render Support.** — This subject will be considered later in treating of the wife's necessaries, when it will also appear that our married women's acts tend to certain changes, not so much of principle as application, by extending the liability for family supplies to property such as wives now hold to their separate use. The general rule of law is that the husband, the spouse who holds and fills the purse, is bound to provide the family support and means of living. The style of support requisite — of lodging, food, clothing, and the like — is such as befits his means and condition of life. A wife is not usually justified in leaving her husband and the common home so long as the husband treats her kindly, and provides to the extent of his ability, even though retrenchment in the style of living may be needful from one cause or another.[1] But reducing the wife's comforts needlessly, and from sinister motives, she may justly complain of,[2] and criminal prosecution with recognizance is found to aid the common law in compelling a competent husband to support his family.

§ 43. **Wife's Duty to render Services.** — The wife's obligation to render family services is at least co-extensive with that of the husband to support her in the family, these services and the comfort of her society being in fact the legal equivalent of such support.[3] Hence, as it is held, the wife of an insane man cannot claim special compensation out of his estate for taking care of him, even though such were the express contract between herself and the guardian.[4] Doubtless it would be bad policy to permit marital services on either side, however meritorious, to become a matter for money recompense, and to strike a just balance is impossible.

§ 44. **Right of Chastisement and Correction.** — Though either spouse may be the more dangerous companion, because of greater physique, daring, recklessness, or depravity, nature

[1] See Skean *v.* Skean, 33 N. J. Eq. 148.

[2] Boyce *v.* Boyce, 23 N. J. Eq. 337. And see Necessaries, *post;* also People *v.* Pettit, 74 N. Y. 320; Schoul. Hus. & Wife, § 67.

[3] Randall *v.* Randall, 37 Mich. 563, per Cooley, J.; Grant *v.* Green, 41 Iowa, 88.

[4] Grant *v.* Green, 41 Iowa, 88.

gives the husband the usual advantage. In a ruder state of society the husband frequently maintained his authority by force. The old common law recognized the right of moderate correction, which, according to Blackstone, was deemed a privilege by the lower orders in his day.[1] The civil law went still further, permitting, in certain gross misdemeanors, violent flogging with whips and rods.[2] But since the time of Charles II. the wife has been regarded more as the companion of her husband; and this right of chastisement may be regarded as exceedingly questionable at the present day. The rule of persuasion has superseded the rule of force. Few cases of importance are to be found on this subject. In England, not many years ago, where a wife sought divorce from bed and board for cruelty, it was shown that the husband had spit upon her, pushed and dragged her about the room, and once slapped her face; and upon this proof the divorce was granted.[3] The right to inflict corporal punishment upon the wife has never been favored in this country, and its exercise would now generally justify proceedings for a divorce. Indeed, our latest State decisions emphatically deny that the right longer exists either in England or this country.[4] It may be added that the wife should not chastise her husband; nor provoke harsh treatment by her own violence, foul abuse, and misconduct.[5]

[1] 1 Bl. Com. 444, 445. In Adams *v.* Adams, 100 Mass. 365, Chapman, C. J., states the old form of the writ of *supplicavit* for protection of the wife against her husband; viz., that the husband should not do other damage to her person "than what reasonably belongs to her husband for the purpose of the government and chastisement of his wife lawfully."

[2] *Flagellis et fustibus acriter verberare uxorem.* See 1 Bl. Com. 445.

[3] Saunders *v.* Saunders, 1 Rob. Ec. 549. And see Schoul. Hus. & Wife, § 507; 1 Bish. Mar. & Div. 5th ed. §§ 748, 754.

[4] Gholston *v.* Gholston, 31 Geo. 625; Pillar *v.* Pillar, 22 Wis. 658; Edmonds' Appeal, 57 Penn. St. 232; Fulgham *v.* State, 46 Ala. 143; Owen *v.* State, 7 Tex. App. 329; Gorman *v* State, 42 Tex. 221; 1 Bish. § 754, and cases cited. In State *v.* Rhodes, 1 Phill. (N. C.) 453, the right of moderate correction was recently claimed. But the opposite rule is announced in the later case of State *v.* Oliver, 70 N. C. 60. Corporal chastisement is not justified, though the wife be drunk or insolent. Commonwealth *v.* McAfee, 108 Mass. 458; Pearman *v.* Pearman, 1 Swab. & T. 601.

[5] Knight *v.* Knight, 31 Iowa, 451, and cases *supra;* Prichard *v.* Prichard, 3 Swab. & T. 523; Trowbridge *v.* Carlin, 12 La. Ann. 882.

But either spouse may use force in self-defence. And the husband may restrain his wife from acts of violence against others as well as himself in person or property, — most certainly wherever the law makes him answerable in damages for her misbehavior;[1] and may prevent her unwarrantable interference with the due exercise of his parental authority.

§ 45. **Husband's Right of Gentle Restraint.** — The right of gentle restraint over the wife's person rests upon better authority than that of chastisement. This right, however, depends upon the proposition that the husband is *dignior persona*. And its exercise is often to be justified in the courts on the same grounds; namely, that the husband must answer to others for his wife's conduct. Blackstone says that in case of any gross misbehavior the husband can restrain his wife of her liberty. The later expression of Kent is that he may resort to "gentle restraint."[2] Strong instances for the exercise of this right occur where the wife has eloped with a libertine, and the husband wishes to bring her home; or where she purposes an elopement, and he seeks to prevent it; or, perhaps, where she goes recklessly into lewd company.[3] Restraint may also be justified where the wife becomes insane, threatens the husband with danger, or wantonly destroys his property.[4]

So, too, the husband, by virtue of his marital authority over his own household, might be allowed, if not by physical force, at least by moral coercion, to regulate her movements so as to prevent her from going to places, associating with people, or engaging in pursuits, disapproved by himself on rational grounds. This doctrine has been asserted in England; and Mr. Fraser carries it to the extent of forbidding her relatives to visit her; "for," he observes, "though the

[1] 2 Kent Com. 181; People *v.* Winters, 2 Parker (N. Y. Cr.), 10; 1 Bl. Com. 445; Richards *v.* Richards, 1 Grant, 389.

[2] 2 Kent Com. 181; 1 Bl. Com. 445.

[3] So strongly does the common law detest conjugal unfaithfulness, that the husband who kills his wife or her paramour in the act of adultery is only guilty of manslaughter. See Regina *v.* Kelly, 2 Car. & K. 814.

[4] 8 Mod. 22; 1 Stra. 477; *In re* Price, 2 Fost. & F. 263; State *v.* Craton, 6 Ire. 164. And see 1 Bish. Mar. & Div. § 756.

wife may be very amiable, her connections may not be so."[1] But this rule is to be laid down with great caution, and it may be considered especially unpopular in America. Mr. Justice Coleridge, in an English case, observes that the husband's right must not be exercised unnecessarily or with undue severity; and that the moment the wife, by her return to conjugal duties, makes the restraint of her person unnecessary, such restraint becomes unlawful.[2]

Our modern doctrine is that force, whether physical or moral, systematically exerted to compel the submission of a wife in such a manner, and to such a degree, and during such a length of time, as to injure her health and threaten disease, is legal cruelty.[3]

§ 46. **Regulation of Household, Visitors, &c.** — From the common-law relation of husband and wife it follows, as our last section indicates, that the general regulation of a household is the privilege of the husband, who is its lawful head. The wife in this respect is to be viewed as his representative or executive officer, properly entrusted with domestic details, and particularly with the supervision of female menials and their work. Husbands are sometimes blameworthy in the course of such regulation for pettiness, meanness, and inconsiderateness towards their wives. And yet households differ, and legal cruelty cannot readily be predicated of such conduct further than that, in divorce suits, misbehavior of this kind is frequently alleged in aggravation of actual cruelty otherwise practised, and so as to give body to the latter charge. It cannot be called cruelty or a breach of marital duty justifying legal interference, for a married householder, however large his establishment, to take the settlement of the little bills upon himself,[4] or the hiring and discharge of the servants.

As to the question how far the wife is bound to observe the

[1] 1 Fras. Dom. Rel. 459. This observation was made by Lord Stowell in Waring *v.* Waring, 2 Hag. Con. 153; 1 Eng. Ec. 210.

[2] *In re* Cochrane, 8 Dowl. P. C. 631.

[3] Kelly *v.* Kelly, L. R. 2 P. & D. 31; Bailey *v.* Bailey, 97 Mass 373. See Schoul. Hus. & Wife, §§ 507–510.

[4] Evans *v.* Evans, 1 Hag. Con. 35, 115.

husband's directions in entertainment, the choice of visitors, the arrangement of the rooms, and so on, the English rule is still strict, or, rather, permissive of the husband's sway. The wife is expected to conform to her husband's habits and tastes, even to his eccentricities, provided her health be not seriously endangered by so doing. And though he should restrict the calling list to a certain set agreeable to himself alone, or interdict intercourse with her family, or prevent her from paying a visit to his own relatives, all of which we may well presume to be unkind and unreasonable, yet this alone is not sufficient ground for divorce.[1] Nor, as it has been held in this country, would divorce be granted simply because he had forbade her to attend a particular church of which she was a member.[2] Modern American precedent, however, on all these points is quite scanty. And whether the husband can allege misconduct against his wife, or obtain redress on his part if she rebels against oppressive discipline of this kind, is extremely doubtful. Whims and caprices of the husband, submission to which endangers the wife's health, need not be followed, and may even be relieved against as legal cruelty;[3] and perhaps the former should be said of constraint upon religious worship as the worshipper's conscience dictates; for the husband's right to manage his house and wife must doubtless be understood to have rational limits.

§ 47. **Custody of Children.**— The custody of children belonged at common law to the father. Blackstone observes: "A mother, as such, is entitled to no power, but only to reverence and respect."[4] But by an English statute, passed in 1839, the court of chancery is permitted to interfere and award the custody of children to such parent as may be deemed most suitable. Its special object was to enable married women who should be ill-treated by their husbands to assert their rights without the fear of being separated from

[1] Neeld *v.* Neeld, 4 Hag. Ec. 263; D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773; Waring *v.* Waring, 2 Hag. Con. 153; Shaw *v.* Shaw, 17 Conn. 189; Fulton *v.* Fulton, 36 Mo. 517.

[2] Lawrence *v.* Lawrence, 3 Paige, 267.

[3] Kelly *v.* Kelly, L. R. 2 P. & D. 31; 1 Bish. § 758.

[4] 1 Bl. Com. 453.

their offspring.[1] In this country the tendency of legislation is to place the wife upon an equal footing with her husband in this respect, so that husband and wife together shall have in their children a joint interest and control, which the courts are to regard as distinct only when the welfare of these tender beings makes judicial intervention necessary.[2]

§ 48. **Remedies of Spouses against each other for Breach of Matrimonial Obligations.** — As no legal process can safely be enforced to compel husband and wife to live together, against the will of either, so the peace of society forbids that they should sue one another for damages for breach of the marital obligations. Here again is marriage *sui generis*, and not like other contracts. But the failure of the one to perform recognized duties may sometimes absolve the other from certain corresponding obligations. Thus, if the wife leaves her home without justifiable cause, the husband may refuse to support her.[3] If the husband is cruel, or makes his home unfit for a chaste woman to live in (which is a species of cruelty), the wife may leave and compel him to support her elsewhere.[4] This is well recognized law. In general, however, such violation of marital obligations is effectually punishable, not by enforcing them as in the old English suit for restitution of conjugal rights, which is not recognized in the United States, but by putting an end to the relation altogether.[5] And it is in the modern proceedings for divorce that we now find the subject of marital obligations most frequently discussed, with, however, a bias towards the construction of the divorce statutes themselves.

Husband and wife may be indicted for assault and battery upon each other.[6] This is a means of redress not unfrequently

[1] 2 & 3 Vict. c. 54; Warde *v.* Warde, 2 Ph. 786.

[2] See *post*, Parent and Child, ch. 3, where the subject is considered at length, as more appropriate to that branch of the family law.

[3] 2 Kent Com. 147; Manby *v.* Scott, 1 Mod. 124; 1 Bl. Com. 443.

[4] Houliston *v.* Smyth, 3 Bing. 127. And see *post*, as to wife's necessaries.

[5] See 1 Bish. Mar. & Div. § 771; 1 Fras. Dom. Rel. 452; Adams *v.* Adams, 100 Mass. 365; Briggs *v.* Briggs, 20 Mich. 34; Schoul. Hus. & Wife, §§ 72–77.

[6] Bradley *v.* State, Walker, 156; State *v.* Mabrey, 64 N. C. 592; Whipp *v.* State, 34 Ohio St. 87.

sought against cruel husbands, especially among those of low surroundings, where drunkenness is common, and religion treats divorce for cruelty with disfavor; and a husband who beats his wife inexcusably may be convicted of this offence.[1] So, too, the offending spouse may be bound to keep the peace. For unreasonable and improper checks upon her liberties, the wife may have relief on *habeas corpus*. But the writ is not available for the husband to secure the person of his wife, voluntarily absenting herself from his house.[2]

§ 49. **The Spouse as a Criminal; Private Wrongs and Public Wrongs compared.** — We shall find the doctrine of coverture affecting the liability of a married woman for her fraud or injury, so that her husband must respond to others in damages for her.[3] But here the private wrong and the public wrong stand contrasted. The immunity of the wife does not extend to criminal prosecutions. For, as Blackstone observes, the union is only a civil union.[4] Or, to come more to the point, it would be cruel and unjust to punish one person for the crime of another, or even to compel the two to bear the penalty together; while it would be impolitic, as well as unjust, to allow any relation which human beings, morally responsible, might sustain with one another, to absolve either from public accountability. Here coverture as a theory contradicts itself, by leaving the wife answerable alone for her crimes, just as a single woman. The utmost the law can do is to furnish a presumption of innocence in her favor in cases where the coercion of her husband may be reasonably inferred.

§ 50. **Presumption of Wife's Coercion, how far carried.** — This indulgence of presumed innocence, it is said, is carried so far

[1] In North Carolina, where the right to moderately chastise has been so reluctantly yielded, it is admitted that if the circumstances involve malice, cruelty, or the infliction of permanent injury upon the wife, the husband may properly be convicted of assault and battery. State *v.* Oliver, 70 N. C. 60. But in this State trivial complaints are not favored. And a sentence to imprisonment for five years in an aggravated case was lately considered a "cruel and unusual" punishment. State *v.* Driver 78 N. C. 423.

[2] *Ex parte* Sandiland, 12 E. L. & Eq. 463. See Adams *v.* Adams, 100 Mass. 365, as to the old writ of *supplicavit* formerly issued for protection of the wife against her husband.

[3] See *post*, c. 4.

[4] 1 Bl. Com. 443.

as to excuse the wife from punishment for theft, burglary, or other civil offences "against the laws of society," when committed in the presence or by the command of her husband; but not so as to exculpate the wife for moral offences. For *mala prohibita* she is not punished, for *mala in se* she is. Such a distinction is variable and somewhat shadowy; the line seems to be drawn more wisely, if at all, between such heinous crimes as murder and manslaughter, and the lighter offences.[1] And the better opinion is, decidedly, that at the most coercion is only a presumption, which may be rebutted by evidence to the contrary.[2]

The presumption, therefore, that in the less heinous crimes committed by the wife in her husband's presence, the wife acts under the husband's coercion, may in any case be repelled by suitable proof; and when it is, the wife, as one acting *sui juris*, must be held responsible for the wrong done by her in her husband's company. This is the true rule. Husband and wife may, therefore, both be indicted and convicted of a crime where it appears that both were guilty of the offence and the wife was not coerced.[3] In most of the latest cases where the wife is indicted, the presumption of coercion has been regarded as something to be easily rebutted, especially in that numerous class of cases which relates to the illegal sale of liquors, a business in which married women frequently engage understandingly.[4] And where the crime is heinous, and the presence and command of the husband do not concur, a jury may readily find the wife independently guilty.[5]

[1] 2 Kent Com. 11th ed. 150; 4 Bl. Com. 28, 29, and Christian's notes; 1 Hawk. P. C. b. 1, ch. 1, § 9; 1 Russ. Crimes, 18–24.

[2] 2 Kent Com. 11th ed. 150; State *v.* Parkerson, 1 Strobh. 169; 1 Russ. Crimes, 22; 2 Lew. C. C. 229; Uhl *v.* Commonwealth, 6 Gratt. 706; Wagener *v.* Bill, 19 Barb. 321; cases *infra;* 1 Greenl. Ev. 10th ed. § 28.

[3] Goldstein *v.* People, 82 N. Y. 231; Mulvey *v.* State, 43 Ala. 316; State *v.* Potter, 42 Vt. 495; People *v.* Wright, 38 Mich. 744; State *v.* Camp, 41 N. J. L. 306.

[4] See State *v.* Cleaves, 59 Me. 298; Commonwealth *v.* Tryon, 99 Mass. 442; Commonwealth *v.* Pratt, 126 Mass. 462.

[5] Presumption of coercion rebutted in a murder case, where wife had conspired with her husband to commit robbery. Miller *v.* State, 25 Wis. 384. In People *v.* Wright, 38 Mich. 744, where a wife, participating with her husband in a robbery, throttled the victim and told him to keep still, while her husband and a confederate rifled his pockets, a verdict of independent guilt against her was sustained.

A wife who committed larceny by her husband's bare command, when he was not present, has been held liable therefor; and our present tendency is to refuse exculpation to the wife unless the husband commanded and was near enough besides to exert his marital influence upon her participation in accomplishing the particular crime.[1]

§ 51. **Offences against the Property of One Another.** — Public policy forbids that either spouse should molest the person of the other with impunity.[2] But as to the property of a spouse our law pursues a distinction. Accordingly, it is well established that the wife cannot be found guilty of stealing the goods of her husband, inasmuch as she resides with him and has possession of the goods by virtue of the marriage relation.[3] And as to the husband, whose legal possession and control of his wife's property during wedlock is far stronger, it is held that, not even upon the ground that a certain building was his wife's separate property, can he be convicted of arson for setting it on fire.[4]

§ 52. **Mutual Disability to Contract, Sue, &c.** — Husband and wife cannot make gifts or sales to one another during coverture, though the same parties might have done so before and in contemplation of marriage. Nor can they in other respects contract or enter into covenants with one another. Nor can one sue the other.[5] But, as we shall hereafter see, equity and modern legislation introduce a different principle. This disability of the spouses to sue one another is not merely the technical one that, under the old procedure, husband and wife must join, but is founded on the principle that

[1] Seiler *v.* People, 77 N. Y. 411; State *v.* Camp, 41 N. J. L. 306; State *v.* Potter, 42 Vt. 495; Commonwealth *v.* Lewis, 1 Met. 151; Commonwealth *v.* Feeney, 12 Allen, 560; Commonwealth *v.* Munsey, 112 Mass. 287; Edwards *v.* State, 27 Ark. 493. See further, Schoul. Hus. & Wife, §§ 76–78.

[2] See, *e. g.*, as to remedies for assault and battery; *supra*, § 48.

[3] Queen *v.* Kenny, 2 Q. B. D. 307; Lamphier *v.* State, 70 Ind. 317.

[4] Snyder *v.* People, 26 Mich. 106. Modern American statutes frequently change this last rule. See Schoul. Hus. & Wife, Appendix. And see *ib.* §§ 78, 79.

[5] Lord Hardwicke, in Lannoy *v.* Duchess of Athol, 2 Atk. 448; 1 Bl. Com. 442; 2 Kent Com. 129. The married women's acts in this country have changed the common law greatly as to the mutual right of suit. And see, as to modern rules, c. 14, *post*, Transactions between Husband and Wife.

husband and wife are one.[1] There is sound policy, moreover, in discouraging the pair from making of their matrimonial bickerings a cause of action for damages against one another. However it may be, at this day, therefore, as to actions of contract, or proceedings in equity, arising out of their distinct property relations, the wife has no cause of action in damages against her husband for a pure tort committed upon her person during the marriage relation, such as assault or false imprisonment. And as the objection to such actions is not merely one of procedure, the fact that she has since procured a divorce will not enable her to bring such a suit.[2]

§ 53. **Mutual Disqualification as Witnesses.** — One of the most important of the mutual disabilities of the marriage state is the disqualification of husband and wife to testify as witnesses in the courts for or against one another. Blackstone places this prohibition on a technical ground, — unity of the person; for, he says, if they testify in behalf of one another, they contradict the maxim, "*Nemo proprià causâ testis esse debet;*" and, if against one another, that other maxim, "*Nemo tenetur se ipsum accusare.*"[3] He also suggests interest as another ground for the rule, and this doubtless is a good one. But a more solid reason than either is that of public policy. "The happiness of the married state," says Mr. Greenleaf, "requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept forever inviolable; that nothing shall be extracted from the bosom of the wife which was confided there by the husband."[4]

So unyielding is this rule, that mutual consent will not authorize the breach of it.[5] Whether the suit be civil or

[1] Blackburn, J., in Phillips *v.* Barnet, 1 Q. B. D. 436.

[2] Phillips *v.* Barnet, 1 Q. B. D. 436; Abbott *v.* Abbott, 67 Me. 304.

[3] 1 Bl. Com. 443.

[4] 1 Greenl. Evid. § 254. See also 2 Kent Com. 178–180, to the same effect. But apparently Chapman, J., in Peaslee *v.* McLoon, 16 Gray, 488, prefers to consider that interest, more than policy, determined the question at common law.

[5] 1 Greenl. Evid. § 340, and cases cited; Lord Hardwicke, in Barker *v.* Dixie, Cas. temp. Hardw. 264; Davis *v.* Dinwoody, 4 T. R. 679, per Lord Ken-

criminal, in law or at equity, it matters not. Form yields to substance in procedure, for the sake of excluding such testimony. And after coverture has terminated by death or divorce, still the prohibition lasts as to all which took place while the relation existed.[1] The disability of the husband is in this respect as great as that of the wife.[2] The rule applies alike to evidence of declarations made by husband and wife for or against one another, and to their testimony in person.[3] Nor is a wife a competent attesting witness to a will which contains a devise to her husband;[4] nor one claiming as widow, the right to administer, competent to establish her marriage.[5] Nor are the spouses competent witnesses for or against one another in a suit for divorce on the ground of adultery, nor in proceedings for bigamy against one of them.[6] And it is said that the law guards the marital confidence of silence as well as that of communication.[7]

This rule of exclusion applies only to persons occupying the *bona fide* relation of husband and wife; not, of course, to a mistress, or parties in immoral cohabitation. But at the same time the courts lean kindly towards *prima facie* marriages, and make no rigid investigation.[8] The policy of the

yon; *contra*, Pedley *v.* Wellesley, 3 Car. & P. 558; 2 Kent Com. 179.

[1] Monroe *v.* Twistleton, cited in Averson *v.* Lord Kinnaird, 6 East, 192; Doker *v.* Hasler, Ry. & M. 198; Stein *v.* Bowman, 13 Pet. 223; 1 Greenl. Evid. § 337. See also Terry *v.* Belcher, 1 Bailey, 568; State *v.* Jolly, 3 Dev. & Bat. 110; Crose *v.* Rutledge, 81 Ill. 266; Wood *v.* Shurtleff, 46 Vt. 525; Barnes *v.* Camack, 1 Barb. 392. But see Dickerman *v.* Graves, 6 Cush. 308.

[2] See cases cited in 1 Greenl. Evid. § 334. And see Turner *v.* Cook, 36 Ind. 129; Richards *v.* Burden, 31 Iowa, 305; Rea *v.* Tucker, 51 Ill. 110; Succession of Wade, 21 La. Ann. 343. The wife is not competent to prove an *alibi* for her husband in a criminal prosecution. Miller *v.* State, 45 Ala. 24.

[3] 1 Greenl. Evid. § 341; 6 T. R. 680; 7 T. R. 112; Kelly *v.* Small, 2 Esp. 716; Brown *v.* Wood, 121 Mass. 137; Schoul. Hus. & Wife, § 83.

[4] Sullivan *v.* Sullivan, 106 Mass. 474. The Massachusetts rule is contrary to that of New York and Maine. See authorities cited in this case.

[5] Redgrave *v.* Redgrave, 38 Md. 93.

[6] Marsh *v.* Marsh, 29 N. J. Eq. 396; Finn *v.* Finn, 19 N. Y. Supr. 339; People *v.* Houghton, 41 N. Y. Supr. 501. But see State *v.* Bennett, 31 Iowa, 24.

[7] Goodrum *v.* State, 60 Ga. 509.

[8] 1 Greenl. Evid. § 339, and cases cited; 2 Stark. Evid. 400; Bull. N. P. 287; Campbell *v.* Twemlow, 1 Price, 81. So as to the wife of a freedman. Hampton *v.* State, 45 Ala. 82. The rule of exclusion does not extend to a mistress or the husband of one's paramour. Dennis *v.* Crittenden, 42 N. Y. 542;

rule is evidently to treat as privileged communications all that passes between persons supposing themselves lawfully married, and at all events not to prejudice the rights of the innocent party to an invalid marriage; but the rule has not always been carried to such an extent. Some exceptions exist to the rule, founded mainly on considerations of public policy.[1]

There have been some important changes introduced into the law of evidence in some parts of this country by statute; such as permitting interested persons to testify in their own suits. Where the old doctrine prevails, the exclusion of the husband, by reason of direct interest, operates to exclude his wife likewise.[2] So the husband cannot be a witness in a controversy respecting his wife's separate estate, though in respect to other parties concerned be might be competent.[3] The English Evidence Act of 1853, 16 & 17 Vict. c. 83 (which has been substantially enacted in some parts of this country), renders husbands and their wives competent and compellable witnesses for each other, except in criminal cases and in cases of adultery; but neither shall be compelled to disclose communications made during marriage.[4] On the whole, the prevailing tendency of late years in both England and America is to regard domestic confidence or the bias of a spouse as of little

Mann *v.* State, 44 Tex. 642; Hill *v.* State, 41 Ga. 484; Rickerstriker *v.* State, 31 Ark. 207; State *v.* Brown, 28 La. Ann. 279. See further, Schoul. Hus. & Wife, § 83.

[1] 2 Russ. on Crimes, 605, 606; 1 Bl. Com. 443; 1 Greenl. Evid. § 343, and cases cited in note; Schoul. Hus. & Wife, § 84, and cases cited.

[2] 1 Greenl. Evid. § 341; *Ex parte* Jones, 1 P. Wms. 610; and cf. Stat. 6 Geo. IV. c. 16, § 37.

[3] 1 Burr. 424, per Lord Mansfield; 12 Vin. Abr. Evidence B. And see note to 1 Greenl. Evid. § 341, with authorities cited. In various States a spouse, under statute, may be a competent witness to a greater or less extent with reference to wife's separate property. Musser *v.* Gardner, 66 Penn. St. 242; Northern Line Packet Co. *v.* Shearer, 61 Ill. 263; Porter *v.* Allen, 54 Ga. 623; Wing *v.* Goodman, 75 Ill. 159. As where the husband dealt with the wife's separate property as her agent. Chesley *v.* Chesley, 54 Mo. 347; Menk *v.* Steinfort, 39 Wis. 370. But cf. Robison *v.* Robison, 44 Ala. 227.

[4] See Ed. note to 10th ed. 2 Kent Com. 181; Stapleton *v.* Croft, 10 E. L. & Eq. 455; Barbat *v.* Allen, *ib.* 596; Alcock *v.* Alcock, 12 *ib.* 354; State *v.* Wilson, 30 N. J. 77; Farrell *v.* Ledwell, 21 Wis. 182; Peaslee *v.* McLoon, 16 Gray, 488; Metler *v.* Metler, 3 C. E. Green, 270. See Schoul. Hus. & Wife, § 85 and *n.*, where the modern cases are collated.

consequence compared with the public convenience of extending the means of ascertaining the truth in all causes; such facilities being increased, it is believed, by hearing whatever each one has to say, and then making due allowance for circumstances affecting each one's credibility. By the modern enlargement of the wife's separate contract and property relations, moreover, the spouses are presented, not so constantly as partakers of one another's confidence, but rather as persons having adverse interests to maintain, or else as principal and agent.[1]

CHAPTER III.

EFFECT OF COVERTURE UPON WIFE'S DEBTS AND CONTRACTS.

§ 54. **General Inequalities of Coverture at Common Law.** — The property rights of married women are restrained at the common law. The husband yields to his wife no participation whatever in his own property, whether acquired before or during the continuance of the marriage relation, except a certain right of inheritance to his goods and chattels, of which he can generally deprive her by his will and testament, and also dower in his real estate, which is her only substantial

[1] A statute providing for the admission of interested parties as witnesses does not *per se* remove the disqualification of husband and wife. Lucas *v.* Brooks, 18 Wall. 436; Gibson *v.* Commonwealth, 87 Penn. St. 253; Schultz *v.* State, 32 Ohio St. 276; Gee *v.* Scott, 48 Tex. 510.

If one marital party testifies for or against the other, under statute, cross-examination must be permitted, even if it compels the testimony to the opposite direction. Ballentine *v.* White, 77 Penn. St. 20; Steinburg *v.* Meany, 53 Cal. 425.

A wife cannot testify against her husband upon his trial for theft of her property. Overton *v.* State, 43 Tex. 616.

Concerning testimony as to conversations held by married parties when they were alone, the rule of the common law, encouraging their confidence, is presumed to be unchanged unless the statute is positive to that effect. Raynes *v.* Bennett, 114 Mass. 424; Westerman *v.* Westerman, 25 Ohio St. 500; Brown *v.* Wood, 121 Mass. 137; Wood *v.* Chetwood, 27 N. J. Eq. 311; Stanford *v.* Murphy, 63 Ga. 410.

privilege. In return for this, she parts with all control, for the time being, over her own property, whensoever and howsoever obtained, by gift, grant, purchase, devise, or inheritance, gives him outright her personal property in possession, and allows him to appropriate to himself those outstanding rights which are known as her *choses in action*, or all the rest of her personal property; parts with the usufruct of her real estate, creating likewise a possible encumbrance upon it in the shape of tenancy by the curtesy; and finally takes, if she survives him, only her real estate, such of her personal property as remains undisposed of and unappropriated, with a few articles of wearing apparel and trinkets called *paraphernalia*. She cannot restrain his rights by will. She is not allowed to administer on his personal estate in preference to his own kindred, though the whole of it were once hers; while he can administer on her estate for his own benefit, and exclude her kindred altogether, even from participation in the assets. Thus unequal are the property rights of husband and wife by the strict rule of coverture. We speak not here of recent statutory benefits conferred upon the wife; nor of that relief which equity affords in permitting property to be held to the wife's separate use, and giving her a provision from her *choses in action*, when the husband seeks its aid in appropriating them to his own use; but of what is to be properly termed the common law of husband and wife.[1]

Some recompense is afforded to the wife for the loss of her fortune, in the rule that her husband shall pay her debts contracted while a *feme sole;* that is, unmarried. And while coverture lasts he is liable for all just debts incurred in her support. He has even been held guilty of murder in the second degree when he has suffered her to die for want of proper supplies.[2] The wife cannot make a contract so as to bind herself; but in this, and other cases of express or implied authority, she can bind her husband, and so secure a maintenance. That which cannot be enforced by the wife as a

[1] See 1 Bl. Com. 442–445, and notes, by Christian, Hargrave, and others; 2 Kent Com. 130–143; and chapters *infra*.

[2] Reg. *v.* Plummer, 1 Car. & K. 600.

matter of obligation is often attained at the common law in some indirect way.[1] Nor can the wife sue and be sued in her own right.

So, too, the husband is liable civilly for the frauds and injuries of the wife, committed during coverture; being sued either alone or jointly with her, in accordance with the legal presumption of coercion in such cases. And he must respond in damages, whether she brought him a fortune by marriage or not. But as we have seen, this rule does not apply to crimes, except that the law shows the wife a certain indulgence where a similar presumption can be alleged on her behalf. On the other hand, the husband takes the benefit of such injuries as she may suffer, by suing with her and appropriating the compensation by way of damages to himself.[2]

§ 55. **Exception where Wife is treated as Feme Sole.** — We may add that the wife is relieved at the common law of the disabilities of coverture, and placed upon the footing of a *feme sole*, with the privilege to contract, sue and be sued, on her own behalf, in one instance, namely, where her husband has abjured the realm or is banished; for he is then said to be dead at the law.[3] And the necessity of the case furnishes the strongest argument for this exception. Another exception early prevailed in certain parts of England by local custom, — as that of London, — where the wife might carry on a trade, and sue and be sued in reference thereto as though single.[4]

§ 56. **Husband's Liability for Wife's Antenuptial Debts.** — One of the immediate effects of marriage at the common law is that the husband at once becomes bound to pay all outstanding debts of his wife, — her debts *dum sola*, as they are called, — of whatever amount. This is a sort of recompense he makes

[1] See 1 Bl. Com. 442; 2 Kent Com. 143–149.

[2] 1 Bl. Com. 443; 2 Kent Com. 149, 150.

[3] 1 Bl. Com. 443; 2 Kent Com. 154. See Separation, *post*.

[4] 1 Selw. N. P. 298; Bing. Inf. 261, 262. The modern practitioner is here cautioned that the statement of the common law in this chapter is a statement of doctrines which at the present day are found to be controlled and changed, to a great extent, by modern equity rules and legislation. See cs. 7-12, *post*.

for taking her property into his hands. But whether she brings him a fortune or not, his liability is not affected. She may owe large sums at the time of marriage and have nothing to offset them. She may have studiously concealed the existence of the debts from her affianced husband. But none of these considerations can avail to shield him. When married, she is married with her debts as well as her fortunes. As Blackstone observes, her husband must be considered to have "adopted her and her circumstances together."[1] This rule is moreover applied without discrimination as to individuals. An infant who marries is bound equally with an adult husband.[2] A second husband is liable for the debts of his wife outstanding at the close of her widowhood, whether contracted prior to the first marriage, or while living separate from her first husband, and upon a separate maintenance, or after the termination of her first coverture and subsequent to the second.[3]

On the other hand, the husband remains liable for the debts of his wife *dum sola* only so long as coverture lasts. As his liability originated in the marriage, so it ceases with it. Hence if the obligation be not enforced in the lifetime of the wife, the surviving husband retains her fortune (if any) in his hands, and cannot be charged further with her debts either at law or in equity.[4] The wife's *choses in action* still unreduced to possession at the time of her death may, however, be reached by her creditors where he has received them as her administrator, though only to the actual amount of such assets; so that this would afford them but partial relief.[5] Nor can the husband's estate after his death be made liable for the wife's debts contracted while sole.[6] Not even the parol promise made by the husband during coverture to pay his wife's debts

[1] 1 Bl. Com. 443; 3 Mod. 186; 2 Kent Com. 143–146; Macq. Hus. & Wife, 39–41; Heard *v.* Stamford, 3 P. Wms. 409; Cas. temp. Talb. 173.

[2] Roach *v.* Quick, 9 Wend. 238; Butler *v.* Breck, 7 Met. 164.

[3] 1 T. R. 5; 7 T. R. 348; Prescott *v.* Fisher, 22 Ill. 390; Angel *v.* Felton, 8 Johns. 149.

[4] 2 Kent Com. 144. See Ch. Ca. 295, cited § 59, *post*.

[5] Heard *v.* Stamford, 3 P. Wms. 409; Cas. temp. Talb. 173; Morrow *v.* Whitesides, 10 B. Monr. 411; Day *v.* Messick, 1 Houst. 328.

[6] 1 Camp. 189; Curtton *v.* Moore, 2 Jones Eq. 204.

dum sola will create an additional liability for them on his part.[1] The injustice of the rule in certain cases is obvious.[2]

On general principles the husband is bound for the debt of his infant wife while sole just as much as though she were an adult, though only to the same extent as she would have been bound. Hence, where the demand is for necessaries furnished her while an infant, the husband, after marriage, becomes bound to pay it, since she would have been liable if she had not married. And the infancy of the husband himself cannot be pleaded against this obligation.[3]

If the wife survives her husband, she becomes liable once more on her debts while sole. And this, too, though the means for extinguishing them may have already been squandered by her husband or placed beyond her reach.[4] Here is a great hardship. Coverture, therefore, seems to operate here as a temporary disability, and not so as to utterly merge the wife's identity. The husband becomes liable by marriage, not as the debtor, but as the husband; the remedy being suspended, or rather shifted, during coverture.

§ 57. **Wife's Antenuptial Debts; Subject continued.** — The liability of the husband for his wife's debts while sole is limited strictly to legal demands; that is, to such as she was bound to pay at the time of her marriage.[5] And if a demand would not be enforceable against her remaining sole, neither is it enforceable against her husband. But the promise or part-payment of the wife cannot take a debt out of the statute of limitations as against her husband, nor can the promise or part-payment of the husband as against his wife. Nor can their admissions charge one another.[6] Their rights in this respect are separately regarded.

All actions for the wife's debts while sole must be brought

[1] Cole *v.* Shurtleff, 41 Vt 311.

[2] See Schoul. Hus. & Wife, § 92.

[3] Cole *v.* Secley, 25 Vt. 220; Anderson *v.* Smith, 33 Md. 465; Bonney *v.* Reardin, 6 Bush, 34.

[4] Woodman *v.* Chapman, 1 Camp. N. P. 189, per Lord Ellenborough.

[5] Cowley *v.* Robertson, 3 Camp. 438; Caldwell *v.* Drake, 4 J. J. Marsh. 246.

[6] Ross *v.* Winners, 1 Halst. 366; Sheppard *v.* Starke, 3 Munf. 29; Brown *v.* Lasselle, 6 Blackf. 147; Moore *v.* Leseur, 18 Ala. 606; Farrar *v.* Bessey, 24 Vt. 89; Parker *v.* Steed, 1 Lea, 206. But see Lord Tenterden, in Humphreys *v.* Royce, 1 Mood. & Rob. 140, as to admissions of the wife allowable in evidence after her death.

against husband and wife jointly, and not against either separately; and judgment obtained by disregarding this rule will be reversed on error.[1] The object is to retain the remedy in hand so that execution may be taken out against the proper party according to circumstances; for, if the husband should die pending the suit, the wife, on her survivorship, would become liable.[2] The rule as laid down in England concerning the wife's personal liability on her debts *dum sola* is that coverture does not wholly relieve her from the consequences of judgment for the time being; for that both may be taken on execution; and when the wife is taken, she shall not be discharged unless it appear that she has no separate property out of which the demand can be satisfied.[3] This rule does not seem to have been recognized with such strictness in this country.[4] But where the wife after marriage pays a portion of her debt, contracted while sole, from funds derived from her separate property, it is said that the husband will be bound by the act, unless he disaffirms it within a reasonable time.[5]

So far as rights of third parties are concerned, the liability of the husband for his wife's debts *dum sola* cannot be affected by any antenuptial contract between the two;[6] nor of course by their agreement during coverture. The special contract of a husband with the creditor, relating to his wife's debt *dum sola*, furnishes a different cause of action to the creditor from that which arises out of the debt *dum sola* taken by itself.[7]

§ 58. **Wife's General Disability to Contract.** — In respect to her disability to contract, the wife may be considered, as Mr.

[1] 1 Keb. 281; Alleyn, 72; Angel *v.* Felton, 8 Johns. 149; 7 T. R. 348; Gage *v.* Reed, 15 Johns. 403; Gray *v.* Thacker, 4 Ala. 136; Platner *v.* Patchin, 19 Wis. 333.

[2] As to judgment and *scire facias*, where the woman dies or marries afterwards, &c., see Schoul. Hus. & Wife, § 96.

[3] Tidd Pract. 9th ed. 1026; Sparkes *v.* Bell, 8 B. & C. 1; Newton *v.* Roe, 7 Man. & Gr. 329; Evans *v.* Chester, 2 M. & W. 847.

[4] Mallory *v.* Vanderheyden, 3 Barb. Ch. 9; s. c. 1 Comst. 453.

[5] Hall *v.* Eaton, 12 Vt. 510. As to effect of husband's bankruptcy upon the wife's debts *dum sola*, see Schoul. Hus. & Wife, § 96.

[6] Harrison *v.* Trader, 27 Ark. 288.

[7] Wilson *v.* Wilson, 30 Ohio St. 365. The common law as to the wife's antenuptial debts is changed considerably by our modern legislation See *post*, cs. 11, 12

Bingham has remarked, worse off at the common law than infants; for the contracts of an infant are for the most part voidable only, while those of married women are, with few exceptions, absolutely void. But the disabilities incident to these two conditions rest upon different grounds; for the disabilities attached to infancy are designed as a protection for the inexperienced against the fraudulent, while those incident to coverture are the simple consequence of that sole or paramount authority which the law vests in the husband.[1] Common sense teaches that married women have sufficient discretion to act for themselves, and stand on a different footing from young children; this the English law fully recognizes, irrespective of equity rules, by empowering all women to contract up to the very moment of their marriage, and from the time when coverture ceases. At most it could only be said that a woman, while living in the married state, was peculiarly subject to influence from the other sex, which might be exerted to her disadvantage.

The husband may make in his own right such contracts as he pleases, as well during coverture as before. He is never presumed to act under the wife's influence.[2] But the wife by coverture becomes disqualified and legally irresponsible in this respect, except in the single instance where her husband is *civiliter mortuus*, as we have already stated;[3] and in certain localities where the separate trade custom applied.[4] But otherwise her incapacity at the common law is total.

To illustrate the wife's disability. She cannot earn money for herself.[5] She cannot, jointly with her husband or alone, sign or indorse a promissory note, so as to bind herself;[6] nor execute a bond or other instrument under seal;[7] nor purchase on her own credit; nor agree to keep a money deposit

[1] See Bing. Inf. & Cov. 181, 182, Am. ed.; 2 Kent Com. 150; *post*, Infancy.

[2] City Council *v.* Van Roven, 2 McCord, 465.

[3] *Supra*, § 55.

[4] *Ib.*

[5] Offley *v.* Clay, 2 Man. & Gr. 172; c. 5, *post*.

[6] Mason *v.* Morgan, 2 Ad. & El. 30; Snider *v.* Ridgeway, 49 Ill. 522; O'Daily *v.* Morris, 31 Ind. 111; Dollner *v.* Snow, 16 Fla. 86; Robertson *v.* Wilburn, 1 Lea, 633; Brown *v.* Orr, 29 Cal. 120; Tracy *v.* Keith, 11 Allen, 214.

[7] Whitworth *v.* Carter, 43 Miss. 61; Huntley *v.* Whitner, 77 N. C. 392.

payable on demand ; nor be surety for another ;[1] nor otherwise make a valid contract.[2] She is permitted, as we shall hereafter see, to pass her real estate by joining in a deed with her husband ; but when she does so she is not bound by her covenants, nor was her separate conveyance (except by some matter of record) of any effect whatsoever.[3] Her covenant in a mortgage of her husband's property,[4] or title bond, or executory contract to convey land,[5] is equally ineffectual. A sheriff's sale of her land upon her judgment note, given as security for her husband, may be set aside as void.[6] In all these cases the wife is considered as under the husband's dominion, and unable to act for herself.[7] On the same principle it is held that a married woman cannot bind herself by her contract to convey estate which is devised to her in trust for sale.[8] The executory and unacknowledged contract of a married woman, being void as a contract, cannot be supported as against her on the ground of estoppel.[9]

§ 59. **Wife's Disability to Contract extending beyond Coverture.** — So far is this doctrine of the wife's contract disability carried, that the agreement of a widow, after her husband's death, to pay a debt which she had contracted during coverture, and which consequently was not binding upon herself,

[1] Swing *v.* Woodruff, 41 N. J. L. 469 ; Gosman *v.* Cruger, 69 N. Y. 87.

[2] Avery *v.* Griffin, L. R. 6 Eq 606; Tobey *v.* Smith, 15 Gray, 535; Goulding *v.* Davidson, 28 Barb. 438 ; Lee *v.* Lanahan, 58 Me. 478. But as to separate estate and modern legislation, see *post*, cs. 10, 11. Her judgment bond is void. Schlosser's Appeal, 58 Penn. St. 493. Likewise her warrant of attorney to confess judgment. Swing *v.* Woodruff, 41 N. J. L. 469 ; Shallcross *v.* Smith, 81 Penn. St. 32.

[3] 2 Bl. Com. 293, 351, 364, and notes by Chitty and others ; Robinson *v.* Robinson, 11 Bush, 174 ; Ferguson *v.* Reed, 45 Tex. 574; Botsford *v.* Wilson, 75 Ill. 133 ; 2 Kent Com. 150–154 ; *Ib.* 167, 168. See *post*, ch. 6. Rule applied to a land patent signed by husband and wife. Shartzer *v.* Love, 49 Cal. 93.

[4] Kitchell *v.* Mudgett, 37 Mich. 81.

[5] Stidham *v.* Matthews, 29 Ark. 650; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164.

[6] Doyle *v.* Kelly, 75 Ill. 574.

[7] Marshall *v.* Rutton, 8 T. R. 545 ; 11 East, 301 ; 2 B. & P. 226 ; 3 B. & C. 291 ; Jackson *v.* Vanderheyden, 17 Johns. 167; Benjamin *v.* Benjamin, 15 Conn. 347; Ayer *v.* Warren, 47 Me. 217 ; Young *v.* Paul, 2 Stockt. 401 ; Stillwell *v.* Adams, 29 Ark. 346; Stockton *v.* Farley, 10 W. Va. 171 ; Savage *v.* Davis, 18 Wis. 608. *Aliter*, as to modern legislation, &c., cs. 10, 11, *post*.

[8] Avery *v.* Griffin, L. R. 6 Eq. 606.

[9] Wood *v.* Terry, 30 Ark. 385; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164. But cf. Norton *v.* Nichols, 35 Mich. 148.

but, if at all, upon her husband, has been treated as void, on the ground that the promise was without consideration and only morally binding.[1] But in another case it was held a sufficient consideration to support a widow's promissory note, that it had been given by her, out of respect for her late husband's memory, to secure a debt due by him.[2] As a rule, of course, the widow cannot be compelled to make good an engagement or fulfil a contract which she entered into while under the disability of coverture.[3]

Lord Nottingham, in a case mentioned in the old reports, once refused to absolve a husband, after his wife's death, from payment for goods which she had purchased prior to the marriage, but never paid for, there being proof that he had actually received the goods, the debt being antenuptial. His lordship declared with earnestness that he would change the law on that point.[4] But in this case it appears that the goods did not actually come to the husband's hands until after the wife's death. And the authority of this decision has since been greatly impaired.[5] In equity the creditors of the first husband may, where his wife was administratrix, follow the assets in the hands of a second husband, although the wife be dead; and at law during her life.[6]

The contract of a married woman, being void, is likewise unenforceable against her after divorce, notwithstanding her subsequent promise, when once more *sui juris;* for such promise is without consideration.[7] But after the death of her spouse, or her divorce from him, her promise, founded on a new consideration, may be enforced against her.

§ 60. **Wife binds Husband as Agent.** — But although the wife, as such, has no power to make a contract, she is allowed at the common law to bind her husband in certain cases as his agent. Her authority may be general or special, express

[1] Meyer *v.* Haworth, 8 Ad. & El. 467; Waul *v.* Kirkman, 25 Miss. 609; Lennox *v.* Eldred, 1 Thomp. & C. 140.

[2] 1 Cr. & J. 231; Tyr. 84. See also Nelson *v.* Searle, 3 Jur. 290.

[3] Ross *v.* Singleton, 1 Del. Ch. 149.

[4] Cha. Ca. 295.

[5] *Ib.*; 1 Eq. Cas. Abr. 60.

[6] Cha. Ca. 80; 1 Vern. 309; 2 Vern. 61, 118; 1 Eq. Cas. Abr. 60, 61; Cro. Car. 603; 1 Roll. Abr. 35. See Magruder *v.* Darnall, 6 Gill, 269.

[7] Putnam *v.* Tennyson, 50 Ind. 456.

or implied. Blackstone says that the power of the wife to act as attorney for her husband implies no separation from, but is rather a representation of, her lord.[1] Whenever the husband expressly empowers his wife to make a contract for him, he will be bound as in the case of any other principal. And he may bind himself in like manner for any unauthorized contract proceeding from his wife as agent, by subsequent conduct on his part amounting to ratification. But greater difficulty arises in determining his liability upon contracts where the authority is not express but only implied. How far does the law go in presuming against the husband, and what are the proper limits of an implied authority in the wife to bind him by her contracts? This is an important inquiry which we shall presently consider.

But let us premise, as a suitable conclusion from the preceding sections, that the husband may be bound in one of two ways, either upon his own contract or upon that made by the wife as his agent; and hence he may be held liable because the debt or obligation was his own, or because his wife represented him. The natural effect of his joining with her in executing a contract or instrument would be to render it his individual obligation, since he is *sui juris*;[2] while if she executed alone and without a suitable agency on his behalf, the obligation would be altogether void.

§ 61. **Wife's Necessaries; Foundation of Husband's Obligation.** — On the important principle of the wife's agency rests the liability of the husband, at common law, in contracts made by the wife for necessaries. It is a clear obligation which rests upon every husband to support his wife; that is, to supply her with necessaries suitable to her situation and his own circumstances and condition in life. Notwithstanding a man married unwillingly, — as, for instance, to avoid a prosecution for seduction or bastardy, — he is bound to support her.[3] But though this obligation appears to rest on the foundation of natural justice, the common law assigns, as the true legal reason, that she may not become a burden to

[1] 1 Bl. Com. 442; 2 Man. & Gr. 172; Mizen *v.* Pick, 3 M. & W. 481.

[2] Dresel *v.* Jordan, 104 Mass. 497.

[3] State *v.* Ransell, 41 Conn. 433.

the community. So long as that calamity is averted, the wife has no direct claim upon her husband under any circumstances whatever; for even in the case of positive starvation she can only come upon the parish for relief; in which case the parish authorities will insist that the husband shall provide for her to the extent of sustaining life.[1] If a husband fail in this respect, so that his wife becomes chargeable to any parish, the statute 4 Geo. IV. c. 83, § 3, says that "he shall be deemed an idle and disorderly person, and shall be punishable with imprisonment and hard labor."[2] And this obligation extends to the whole family, with such modifications as will be more properly noticed in treating of parent and child. If a man marry a widow he is not bound to maintain her children; unless he holds them out to the world as part of his own family.[3] But by the statute 4 & 5 Will. IV. c. 76, § 57, the husband is required to maintain, as part of his family, any child or children, till the age of sixteen, legitimate or illegitimate, that his wife may have at the time of entering into the contract.[4]

To enforce these marital obligations the law takes a circuitous course; and the wife may secure herself from want against a cruel and miserly husband, of ample means to support her, by pledging his credit and making such purchases as are needful, on the strength of an implied authority for that purpose. Here, all other things being equal, it is presumed that she was her husband's agent; and no direct permission need be shown. Indeed, wherever the facts are clear that those articles were actually needed, and that the husband failed to supply them, this presumption is carried so far as to control even the express orders of the husband himself. The articles for which a wife is allowed to pledge her husband's credit as his presumed agent are designated at common law as necessaries.

The wife's necessaries are such articles as the law deems

[1] Rex *v.* Flintan, 1 B. & Ad. 227; 7 Ad. & El. 819.

[2] See Macphers. Inf. 42, 43.

[3] Attridge *v.* Billings, 57 Ill. 489.

[4] 4 T. R. 118. Cooper *v.* Martin, 4 East, 76; 3 Esp. N. P. 1; Hall *v.* Weir, 1 Allen, 261. See *post*, Parent & Child.

essential to her health and comfort; chiefly food, drink, lodging, fuel, washing, clothing, and medical attendance. They are to be determined, both in kind and amount, by the means and social position of the married pair, and must therefore vary greatly among different grades and at different stages of society.[1] Thus a large milliner's bill might not be deemed necessaries for the wife of a laborer, while a wealthy merchant would be bound to pay it. So, too, necessaries to-day are not what they were fifty years ago. Nor is the ordinary test to be found in the real situation and means of the married parties; for this a tradesman cannot be expected to investigate; but in their apparent situation, the style they assume, and the establishment they maintain before the world; which every husband is supposed to regulate with sufficient prudence.[2] Articles, too, may be of a kind which the law pronounces necessaries, and yet a wife may be so well supplied as not to need the particular articles in question, — a distinction of some consequence. The decisions in the books, relating to necessaries, are therefore somewhat confusing, as might be expected; the more so since the dividing line between law and fact, in such cases, is not marked with distinctness. Sometimes the court decides whether articles are necessary, sometimes a jury. The ordinary rule is that the court shall decide whether certain articles are to be classed as necessaries; while the jury may determine the question of amount, and apply this classification to the facts;[3] but this rule, though seemingly precise, is found difficult in its practical application.[4]

[1] 2 Bright Hus. & Wife, 7, 8; Sel. N. P. 260; 6 Car. & P. 419; Cro. Jac. 257, 258; *n.* to 2 Kent Com. 10th ed. 146; *ib.* 138, 139; 1 Bl. Com. 442.

[2] Waithman *v.* Wakefield, 1 Camp. 120.

[3] Renaux *v.* Teakle, 20 E. L. & Eq. 345; 1 Pars. Contr. 241; Hall *v.* Weir, 1 Allen, 261; Parke *v.* Kleeber, 37 Penn. St. 251; Raynes *v.* Bennett, 114 Mass. 424; Phillipson *v.* Hayter, L. R. 6 C. P. 38.

[4] Among the cases we find the following articles classed as necessaries for the wife: Board and lodging. Medicines, medical attendance, and reasonable expenses during illness. Harris *v.* Lee, 1 P. Wms. 438; Mayhew *v.* Thayer, 8 Gray, 172; Cothran *v.* Lee, 24 Ala. 380; Webber *v.* Spannhake, 2 Redf. (N. Y.) 258. Furniture of a house for a wife to whom the court had decreed £380 a year as alimony. Hunt *v.* De Blaquiere, 5 Bing. 550. Silver fringes to a petticoat and side saddle (value £94) furnished to the wife of a

§ 62. **Wife's Necessaries; Living together or separate.** — The husband's liability for necessaries may arise in two distinct

serjeant-at-law. Skin. 349. Watches and jewelry such as befits the style of dress which the husband sanctions, especially if not wholly ornamental. Raynes *v.* Bennett, 114 Mass. 424. Reasonable legal expenses incurred by a wife who had been deserted by her husband, preliminary and incidental to a suit for restitution of her conjugal rights, and in obtaining professional advice as to the proper method of dealing with tradesmen who were pressing their bills. Wilson *v.* Ford, L. R. 3 Ex. 63. Reasonable legal expenses in defence of a prosecution instituted against a wife by her husband (Warner *v.* Heiden, 28 Wis. 517), and even, in a just cause, for prosecuting him. Shepherd *v.* Mackoul, 3 Camp. 326; Morris *v.* Palmer, 39 N. H. 123. A horse worth $45 for the invalid wife of a miller earning $30 per month, in order that she might take exercise as advised by a physician; the question of suitableness, however, being left to the jury. Cornelia *v.* Ellis, 11 Ill. 584. The cost of divorce proceedings, including fees of a proctor, where the wife had reasonable ground for instituting them, but not otherwise. Brown *v.* Ackroyd, 34 E. L. & Eq. 214; Porter *v.* Briggs, 38 Iowa, 166. But cf. this note, *post*. A set of false teeth, and reasonable dentistry. Freeman *v.* Holmes, 62 Ga. 556; Gilman *v.* Andrus, 28 Vt. 241. Household supplies reasonable and proper for the ordinary use of a family, although the wife receives the earnings of two daughters living with her. Hall *v.* Weir, 1 Allen, 261. Perhaps a piano. Parke *v.* Kleeber, 37 Penn. St. 251. But see Chappell *v.* Nunn, 41 L. T. 287.

But, on the other hand, the following articles have been held not to be necessaries: Articles of jewelry for the wife of a special pleader. Montague *v.* Benedict, 3 B. & C. 631. A deed of separation. Ladd *v.* Lynn, 2 M. & W. 265. The expense of an indictment by the wife for assault. Grindell *v.* Godmond, 5 Ad. & El. 755. Especially if the grounds for instituting criminal proceedings did not appear reasonable. Smith *v.* Davis, 45 N. H. 566. Counsel fees in a suit for divorce or to enforce a marriage settlement, whether the wife be plaintiff or defendant. Pearson *v.* Darrington, 32 Ala. 227; Thompson *v.* Thompson, 3 Head, 527; Schoul. Hus. & Wife, § 105; Dow *v.* Eyster, 79 Ill. 254; Whipple *v.* Giles, 55 N. H. 139. Legal expenses and fees are sometimes chargeable against a husband, in cases of this sort, because the statute says so. Thomas *v.* Thomas, 7 Bush, 665; Warner *v.* Heiden, 28 Wis. 517; Glenn *v.* Hill, 50 Ga. 94.

Decisions differ; but the weight of authority is that an action at law for his fees cannot be maintained by a solicitor who prosecutes or defends on the wife's behalf against her husband. Fees and retainers for more solicitors than were needful cannot be allowed. Passage tickets in general to enable the wife to travel, except perhaps for a clearly needful purpose. Knox *v.* Bushell, 3 C. B. N. S. 334. Medical attendance rendered, without the husband's assent, by a quack doctor. Wood *v.* O'Kelly, 8 Cush. 406. Though when a husband disputes a bill for medical attendance on the ground of malpractice, or an unnecessary surgical operation, the burden is on him to show it. M'Clallan *v.* Adams, 19 Pick. 333. "Religious instruction," or the rent of a church pew. St. John's Parish *v.* Bronson, 40 Conn. 75. Articles, in short, which are extravagant and altogether beyond the husband's circumstances and degree in life. Caney *v.* Patton, 2 Ashm. 140. See Phillipson *v.* Hayter, L. R. 6 C. P. 38.

Money lent the wife for the purchase of necessaries, or for other purposes however suitable, is not classed

classes of cases: *first*, where the wife lives with him; *second*, where she lives separate from him. And where the wife lives with him, the husband's assent to her contract for necessaries is inferred from circumstances which show authority actually conferred, or else the law supplies an assent for her benefit where he has improperly refused or neglected to provide for her wants. Where they live apart, separation is either voluntary or involuntary. Let us consider these two classes of cases separately.

§ 63. **Wife's Necessaries where Spouses live together.** — *First*, then, as to a husband's liability where his wife lives with him. Here we are met at the outset by the broad presumption of assent which cohabitation of itself furnishes. The simple circumstance that husband and wife are living together has been generally held sufficient, when nothing to the contrary intervenes, to raise a presumption that the wife is rightfully making such purchases of necessaries as she may deem proper.[1] Whoever then supplies her in good faith, as the law has usually been understood, need inquire no further, but may send his bill to her husband. This rule is a fair one; for it is not to be supposed that a husband will go in person to buy every little article of dress or household provision which may be needful for his family. As Lord Abinger observed, a wife would be of little use to her husband in their domestic arrangements, if his interference was always to be deemed necessary.[2] Accordingly, if an action be brought against the husband for the price of goods furnished under

with necessaries at the common law; probably because husbands do not often confer an authority liable so easily to abuse. Walker *v.* Simpson, 7 W. & S. 83; Stone *v.* McNair, 7 Taunt. 432; Stevenson *v.* Hardy, 3 Wils. 388; Knox *v.* Bushell, 3 C. B. N. S. 334. But equity takes a view more consonant to the wants of a distressed wife, and allows the person lending the money to stand in the stead of the tradesman, and to recover if the money was actually used for necessaries; thus leaving him bound, in other words, only to see that his loan is properly applied. Harris *v.* Lee, 1 P. Wms. 482; Walker *v.* Simpson, 7 W. & S. 83; Kenyon *v.* Farris, 47 Conn. 510; Deare *v.* Soutten, L. R. 9 Eq. 151. See Schullhofer *v.* Metzger, 7 Rob. (N. Y.) 576.

[1] 2 Bright Hus. & Wife, 6, 7; Bull. N. P. 134; Salk. 113; 7 Car. & P. 756. See also 1 Ventr. 42; 2 Vent. 155; Montague *v.* Benedict, 3 B. & C. 631; Manby *v.* Scott, 1 Mod. 124; 1 Sid. 109; 1 Roll. Abr. 351, pl. 5; Freestone *v.* Butcher, 9 Car. & P. 643.

[2] Emmett *v.* Norton, 8 Car. & P. 506.

such circumstances, it must be taken *prima facie* that these goods were supplied by his authority, and he must show that he is not responsible.[1]

The wife's contract for necessaries will bind the husband to a still greater extent if the evidence warrant the inference that a more extensive authority has in fact been given.[2] Thus the presumption which cohabitation furnishes is strengthened by proof that the wife has been permitted by the husband to purchase other articles of the same sort for the use of the household.[3] But it must be ordinarily things for what may be termed the domestic department, to which the wife's authority to bind her husband is restricted.[4]

But we must observe that the question is, after all, one of evidence; it turns upon the question of authority from the husband; and this presumption in the wife's favor may be rebutted by contrary testimony on the husband's behalf.[5] Lord Holt says: "His assent shall be presumed to all necessary contracts, upon the account of cohabiting, *unless the contrary appear.*"[6] Not only is the husband permitted to show that articles in controversy are not such as can be considered necessaries, but he may show that he supplied his wife himself or by other agents, or that he gave her ready money to make the purchase.[7] This is on the principle that the husband has the right to decide from whom and from what place the

[1] Clifford *v.* Laton, 3 Car. & P. 15, per Lord Tenterden. But see *post*, p. 97; Debenham *v.* Mellon, L. R. 5 Q. B. D. 394.

[2] 2 Bright Hus. & Wife, 9; cases cited in note to Filmer *v.* Lynn, 4 Nev. & Man. 559; M'George *v.* Egan, 7 Scott Cases, 112.

[3] 1 Sid. 128; Jewsbury *v.* Newbold, 40 E. L. & Eq. 518.

[4] Phillipson *v.* Hayter, L. R. 6 C. P. 38.

[5] Lane *v.* Ironmonger, 13 M. & W. 368.

[6] Etherington *v.* Parrott, 1 Salk. 118. See also, to the same effect, McCutchen *v.* McGahay, 11 Johns. 281; Montague *v.* Benedict, 3 B. & C. 631; and note by Am editor to Bing. Inf. 187. The position assumed by Mr. Story, in his work on Contracts, that, as to the wife's necessaries, "the law raises an *uncontrollable* presumption of assent on the part of the husband," is therefore incorrect. Story Contr. 2d ed. § 97. "What the law does infer is, that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department, which is ordinarily confided to the management of the wife." Willes, J., in Phillipson *v.* Hayter, L. R. 6 C. P. 38. And see Bovill, C. J., *ib.*, to the same effect.

[7] 1 Sid. 109; Etherington *v.* Parrott, 2 Ld. Raym. 1006.

necessaries shall come, and that, so long as he has provided necessaries in some way, his marital obligation is discharged, whatever may be the method he chooses to adopt. Accordingly in the class of cases which we are now considering, namely, where the spouses dwell together, so long as the husband is willing to provide necessaries at his own home, he is not liable to provide them elsewhere.[1] In general, while the spouses live together, a husband who supplies his wife with necessaries suitable to her position and his own is not liable to others for debts contracted by her on such an account without his previous authority or subsequent sanction.[2]

As a rule, a husband who furnishes his wife and family with necessaries, in any reasonable manner, has the right to prohibit particular persons from trusting or dealing with her on his account. Notice to this effect, properly given, will be effectual as against any presumption which cohabitation raises.[3] And notice given to a tradesman's servant has been held sufficient notice to the master. But notice given in the newspapers not to trust a wife is held to be of no effect against such as have not had actual notice.[4] Nor is a successful defence against one bill sufficient notice of prohibition against subsequent bills.[5] In order to bind the husband for goods furnished after notice to cease furnishing, the seller must show not only that the articles he furnishes are necessaries, but that the husband failed to supply them properly.[6]

Generally, in such cases, it has been said the burden of proof is upon the husband.[7] Such a statement, however, must be taken with caution. Cohabitation furnishes, as we have seen, a presumption of authority; but the latest English decisions go very far toward annihilating that presumption by insisting that the question of the wife's express or implied authority is purely one of fact according to the circumstances of each case, where the spouses live together. And the

[1] Morgan *v.* Hughes, 20 Tex. 141; Jolly *v.* Rees, 15 C. B. N. S. 628.

[2] Seaton *v.* Benedict, 5 Bing. 28.

[3] McCutchen *v.* McGahay, 11 Johns. 281; Keller *v.* Phillips, 39 N. Y. 351.

[4] Walker *v.* Laighton, 11 Fost. (N. H.) 111.

[5] Ogden *v.* Prentice, 33 Barb. 160.

[6] Barr *v.* Armstrong, 56 Mo. 577.

[7] Tebbets *v.* Hapgood, 34 N. H 420.

English court of appeals for such cases[1] has lately confirmed a lower tribunal,[2] as though to dispense very considerably with the necessity of notice to tradesmen on the part of a husband who means to supply his wife properly, and at the same time prevent her from pledging his credit. The point decided, however, affects only tradesmen and others who have had no previous dealings with the wife, to which the husband's assent was given.[3]

§ 64. **Wife's Necessaries, where Spouses live together; Same Subject continued.** — Another point, as we have already suggested, is available to the person who has furnished necessaries on the general principles of agency; namely, that a husband's subsequent ratification is as good as a previous authority. So, then, if it can be shown that the husband knew his wife had ordered certain necessaries, and yet failed to rescind the purchase; or if there be proof that he knew she wore the articles and yet expressed no disapprobation; the law presumes approval of her contract and binds him.[4] To this principle, perhaps, may be referred the rule which Mr. Roper further states (without, however, citing any authorities), that the husband is liable whenever the goods purchased by his wife come to her or his use with his knowledge and permission, or when he allows her to retain and enjoy them; in other words, that a legal liability becomes fixed from the fact that the husband and his household take the benefit of the purchase.[5] But the mere fact that a husband sees his wife wearing articles purchased without authority

[1] Debenham *v.* Mellon, L. R. 5 Q. B. D. 394. Doubt is thrown by this decision upon Johnston *v.* Sumner, 3 H. & N. 261.

[2] Jolly *v.* Rees, 15 C. B. N. S. 628.

[3] Debenham *v.* Mellon, L. R. 5 Q. B. D. 394. The opinion of Bramwell, L. J., in this case is worthy of careful perusal. The same principle is confirmed in this country by Woodward *v.* Barnes, 43 Vt. 330. But cf. Cothran *v.* Lee, 24 Ala. 380; Schoul. Hus. & Wife, § 107.

[4] Seaton *v.* Benedict, 5 Bing. 28; 2 Moo. & P. 74; Parke, B., in Lane *v.* Ironmonger, 13 M. & W. 368; Day *v.* Burnham, 36 Vt. 37; Woodward *v.* Barnes, 43 Vt. 330; Ogden *v.* Prentice, 33 Barb. 160.

[5] 2 Rop. Hus. & Wife, 112; 2 Bright Hus. & Wife, 9. Mr. Macqueen (Hus. & Wife, note to p. 132) points out this statement of Mr. Roper with a doubt as to the authority, although he admits the justice of such a rule, on the civil-law maxim that "no one should enrich himself at another's loss."

will not charge him; the question is one of approval or disapproval, assent or dissent, and the presumption against him may be rebutted.[1]

The husband's dissent to his wife's purchase of necessaries should be expressed in an effectual and suitable manner. Mere objection on his part is insufficient. Thus a bill for medical attendance must be paid by him, even though he objected to the visits, as long as he was present, and gave no notice to the physician that the latter must look elsewhere for payment.[2] And private arrangements between husband and wife as to the method of payment cannot affect the rights of third parties who were entitled to notice thereof and failed to receive it.[3] If he means, when sued in assumpsit for necessaries, to defend the action as to part only, it would appear that his proper plea will be that he is not liable beyond a certain amount, and he should pay that amount into court.[4] But if he means to dispute the charge altogether, common honesty dictates that the articles unwarrantably purchased should be restored without delay.[5] He may introduce evidence at the trial to show that the commodities in question were not necessaries, inasmuch as the wife had incurred other similar debts with other parties.[6] In a word, the question is (in the absence of such evidence of necessity as may show an agency in law) whether there was an agency and authority in fact.[7]

The presumption of an agency on her husband's behalf may be overcome by the fact of a purchase by the wife upon her own or some third person's credit, wherever she is really trusted as principal herself, or as the agent of some one else than her spouse; or where the third person ordered them in person.[8] In all cases the husband will be discharged from

[1] Atkins *v.* Curwood, 7 Car. & P. 756.

[2] Cothran *v.* Lee, 24 Ala. 380.

[3] *Ib.*; Johnston *v.* Sumner, 3 Hurl. & Nor. 261. We have seen, *supra*, § 63, that the latest English cases considerably reduce the tradesman's right of notice as formerly understood. Debenham *v.* Mellon, L. R. 5 Q. B. D. 394.

[4] Emmet *v.* Norton, 8 Car. & P. 506.

[5] Macq. Hus. & Wife, 136; Gilman *v.* Andrus, 28 Vt. 241. See Tuttle *v.* Holland, 43 Vt. 542.

[6] Renaux *v.* Teakle, 20 E. L. & Eq. 345.

[7] Read *v.* Teakle, 24 E. L. & Eq. 332.

[8] Though as to the right of her

liability where it appears that the goods were not supplied on his credit, but that the party furnishing them trusted the wife individually.[1] She might have separate property, independently of her husband, to which the tradesman looked for payment, or a special allowance of sufficient amount might have been made her by her husband.[2] Thus where the husband during a temporary absence made an allowance to his wife, he was held not to be liable for necessaries supplied to her, the tradesman having trusted to payment from her allowance.[3] So if credit be given to a third party, the husband is not liable.[4] And of course, if the tradesman has agreed not to charge him, there is no liability incurred by the husband.[5] Though the wife be without property, the rule is the same; and it would appear that the husband may give permission to trust his wife on her separate credit without incurring liability.[6]

§ 65. **Wife's Necessaries where Spouses live together; Subject continued.** — The usual analogies of agency may be transcended, notwithstanding the spouses live together, where the one is truly delinquent, and the other deprived of the support owing her. Wherever the husband neglects to supply his wife with necessaries, or the means of procuring them, she may obtain what is strictly needful for her support, although it be against his wishes, on the pledge of his credit.

father or any other third person to stand in place of a tradesman, under proper circumstances of necessity; see *supra*, § 61, *n.*

[1] 3 Camp. 22; 5 Taunt. 356; Pearson *v.* Darrington, 32 Ala. 227; Stammers *v.* Macomb, 2 Wend. 454; Moses *v.* Forgartie, 2 Hill (S. C.), 335; Carter *v.* Howard, 39 Vt. 106; Bugbee *v.* Blood, 48 Vt. 497.

[2] Levett *v.* Penrice, 24 Miss. 416; Simmons *v.* McElwain, 26 Barb. 420; McMahon *v.* Lewis, 4 Bush, 138; Weisker *v.* Lowenthal, 31 Md. 413.

[3] Holt *v.* Brien, 4 B. & Ald. 252; Montague *v.* Benedict, 3 B. & C. 631; Harshaw *v.* Merryman, 18 Miss. 106; Renaux *v.* Teakle, 20 E. L. & Eq. 345.

[4] Harvey *v.* Norton, 4 Jur. 42.

[5] Dixon *v.* Hurrell, 8 Car. & P. 717.

[6] Taylor *v.* Shelton, 30 Conn. 122. For circumstances thus repelling the presumption of agency, see Schoul. Hus. & Wife, § 109 and cases cited; Mitchell *v.* Treanor, 11 Ga. 324; 2 Tyr. 523. The husband is not relieved by the single circumstance that the goods were charged on the shop books to the wife, since *prima facie* the actual credit is always supposed to be given to the husband. Jewsbury *v.* Newbold, 40 E. L. & Eq. 518; Godfrey *v.* Brooks, 5 Harring. 396; Furlong *v.* Hyson, 35 Me. 332.

And the person furnishing the articles may sue the husband notwithstanding he has been expressly forbidden to trust her.[1] But here the law raises a presumption of agency only for the purpose of enforcing a marital obligation. Such an agency is perhaps an agency of necessity.[2] And the tradesman or other party furnishing supplies in this case is bound to show affirmatively and clearly that the husband did not provide necessaries for his wife, suitable to her condition in life.[3]

§ 66. **Wife's Necessaries where Spouses live apart.** — In the second class of cases which we are to consider, the husband's liability for his wife's necessaries arises where they are living apart. The rule is that where the husband abandons his wife, turns her away without reasonable cause, or compels her by ill usage to leave him, without adequate provision, he is liable for her necessaries, and sends credit with her to that extent.[4] The wife's faithfulness, on the one hand, to her marriage obligations ; on the other, the husband's disregard of his own : these afford the reason of the above rule and suggest its proper limitation. The wife in such cases has an authority ; but here what some have certainly called an authority of necessity.[5] Or we may say, rather, that the law by a fiction, infers an agency without asking evidence which should show authority in fact, and requires the husband, under these circumstances, to maintain his wife elsewhere.

This rule suggests, then, three cases where the wife may pledge her husband's credit when they are living apart: the first, where he abandons her; the second, where he turns her out of doors without reasonable cause ; the third, where his

[1] Keller *v.* Phillips, 39 N. Y. 351; Cromwell *v.* Benjamin, 41 Barb. 558; Woodward *v.* Barnes, 43 Vt. 330.

[2] Pollock, C. B., in Johnston *v.* Sumner, 3 H. & N. 261, likens the agency under such circumstances to that which the captain of a ship sometimes exercises.

[3] Keller *v.* Phillips, 39 N. Y. 351; Cromwell *v.* Benjamin, 41 Barb. 558; Woodward *v.* Barnes, 43 Vt. 330. As to suing for support of the wife as a pauper, see Monson *v.* Williams, 6 Gray, 416 ; Rumney *v.* Keyes, 7 N. H. 571 ; Norton *v.* Rhodes, 18 Barb. 100; Commissioners *v.* Hildebrand, 1 Carter, 555.

[4] 2 Kent Com. 146, 147; 2 Bright Hus. & Wife, 10–12; Snover *v.* Blair, 1 Dutch. 94; Mayhew *v.* Thayer, 8 Gray, 172.

[5] See Pollock, C. B., in Johnston *v.* Sumner, 3 Hurl. & Nor. 261.

misconduct compels her to leave him. In the first two cases his own acts impose the necessity, and her conduct is involuntary. But in the third her conduct might be considered voluntary, though induced by his misconduct; and the rule here becomes perplexing. The doctrine of *Horwood* v. *Heffer*, an old case, is that the wife is not justified in leaving her husband unless she has been driven from the house by actual violence or apprehension for her personal safety; and in this case the husband was held not to be liable since she had quitted his house because he placed a profligate woman at the head of the table.[1] This doctrine has been strongly condemned in later times, and the modern cases justly regard such studied insults as capable of legal redress. If, therefore, the husband, by his indecent conduct, renders his house unfit for a modest woman to share it, the rule now is that she may leave him, and pledge his credit elsewhere for her necessaries.[2]

Where the wife is justified on any of the above grounds in living apart from her husband, he is not discharged from liability by showing that her contract was in fact made without his authority and contrary to his wishes. Nor will his general advertisement or particular notice to individuals not to give credit to his wife affect the case.[3] The legal presumption must prevail for the wife's protection.

Nor, in such cases, can the husband terminate his liability for necessaries supplied his wife during the separation, by a simple request on his part that she shall return.[4] And it is clear that if he only offers to take her back upon conditions which are unreasonable and improper, his liability continues.[5] It is the husband's duty, by some positive act, to determine his liability; though if the wife voluntarily returns, his liability for necessaries furnished abroad is discontinued. But

[1] 3 Taunt. 421.

[2] Per Lord Ellenborough, Liddlow *v.* Wilmot, 2 Stark. 77; 1 Selw. N. P. 298, 11th ed.; per Best, C. J., Houliston *v.* Smyth, 3 Bing. 127; 10 Moo. 482; 2 Car. & P. 22; Descelles *v.* Kadmus, 8 Clarke, 51; Hultz *v.* Gibbs, 66 Penn. St. 360; Reynolds *v.* Sweetser, 15 Gray, 78; Bazeley *v.* Forder, L. R. 3 Q. B. 559.

[3] 4 Esp. 41; 1 Selw. N. P. 298, 11th ed.; 2 Stra. 1214. See Black *v.* Bryan, 18 Tex. 453.

[4] Emery *v.* Emery, 1 You. & Jer. 501.

[5] Reed *v.* Moore, 5 Car. & P. 200.

in default of any amicable arrangement, he must institute proceedings in the courts with divorce jurisdiction. And until some such unequivocal act is done, a person making a proper claim in a court of law for necessaries supplied to the wife may be entitled to recover against him.[1] Where the wife had good reasons for leaving, the husband is not discharged, by the fact of her subsequent return, from liability for necessaries furnished during her justifiable absence.[2]

But the wife should have weighty and sufficient cause for leaving her husband, in order to be permitted, on her part, to pledge his credit abroad. In general, the same facts suffice as justify divorce from bed and board.[3] But where she leaves her husband without sufficient cause and against his will, he is not liable for her maintenance elsewhere, and she cannot bind him; especially if the person furnishing goods knows that cohabitation has ceased, and makes no further inquiries.[4] Supposing the wife leaves voluntarily and without sufficient cause, against her husband's wishes, and she afterwards returns to her husband, is he bound to receive her; and if he refuse to receive her, can she make him liable for debts contracted thenceforth for necessaries? The current of authorities is in favor of such a position, provided she conducted herself properly in her absence.[5] Some, however, have suggested doubts as to this doctrine; for, they say, since the wife by her own voluntary act discharged the husband from his obligation to maintain her, by unnecessarily quitting his house without his consent, it is but reasonable to say that his liability to support her afterwards should not be revived by

[1] Reed *v.* Moore, *supra*. See Atkyns *v.* Pearce, 2 C. B. N. S. 763.

[2] Reynolds *v.* Sweetser, 15 Gray, 78.

[3] Brown *v.* Patton, 3 Humph. 135; Hancock *v.* Merrick, 10 Cush. 41; Rea *v.* Durkee, 25 Ill. 503; Schindel *v.* Schindel, 12 Md. 294; Stevens *v.* Story, 43 Vt. 327; Barker *v.* Dayton, 28 Wis. 367; Thorpe *v.* Shapleigh, 67 Me. 235.

[4] Brown *v.* Midgett, 40 Vt. 68; Etherington *v.* Parrott, 2 Ld. Raym. 1006: 1 Sid. 130; Bailey *v.* Calcott, 4 Jur. 699; Collins *v.* Mitchell, 5 Harring. 369; Bevier *v.* Galloway, 71 Ill. 517: Harttman *v.* Tegart, 12 Kan. 177; Oinson *v.* Heritage, 45 Ind. 73; Thorne *v.* Kathan, 51 Vt. 520.

[5] Manby *v.* Scott, 1 Sid. 129; 1 Mod. 131; Hindley *v.* Westmeath, 6 B. & C. 200; Howard *v.* Whetstone, 10 Ohio, 365; McCutchen *v.* McGahay, 11 Johns. 281.

implication without his express concurrence in consenting to his wife's return to his protection, or until cohabitation was restored by mutual agreement, or by the sentence of a court with appropriate matrimonial jurisdiction.[1] This is fair reasoning on general grounds, and applies a mutual doctrine to husband and wife; but the courts appear to have thought otherwise.

If, however, as the reader may have inferred, the wife elopes and then commits adultery, or if her adultery causes separation, the husband becomes relieved from her support. Her crime ought to put an end to her authority to bind the injured spouse, and it does.[2] In such case his refusal to take her back again will not revive his obligation to maintain her. But as forgiveness always interposes a bar to legal remedies on behalf of the injured one, he becomes once more liable for her necessaries, where he voluntarily receives her again and forgives her.[3] There are cases where the marital rights and duties become more confused. Supposing the wife be turned out of doors, or, what amounts to the same thing, be forced by her husband's misconduct to leave; and she afterwards, being beyond that shelter which every wife needs, commit adultery; is he then relieved from supporting her? In *Govier* v. *Hancock* it was held that he was, even though his own adultery caused her departure.[4] This was a very harsh decision. The court, however, admitted that necessaries furnished before her own adultery could be recovered from her husband. And in a subsequent case it was held that adulterous conduct of the wife, with the connivance of the husband, or at least without such a separation of the married pair as to make her misconduct notorious, would not, *per se*, operate as a defence and protect the husband from liability.[5] And more to the point is a case decided only a short time ago, where

[1] See 2 Bright Hus. & Wife, 13. But see 2 Bish. Mar. & Div. 5th ed. § 33. See Schoul. Hus. & Wife, § 523, as to divorce remedies.

[2] Morris *v.* Martin, 1 Stra. 647; Manwaring *v.* Sands, 2 Stra. 707; Hardie *v.* Grant, 8 Car. & P. 512; Schoul. Hus. & Wife, § 113.

[3] Harris *v.* Morris, 4 Esp. 41; Robison *v.* Gosnold, 6 Mod. 171; Holt *v.* Brien, 4 B. & Ald. 252; Quincy *v.* Quincy, 10 N. H. 272.

[4] 6 T. R. 603.

[5] Norton *v.* Fazan, 1 B. & P. 226.

the husband was held liable, even though the wife had been found guilty of adultery in the divorce court; since it appeared that he also had been found guilty of adultery, so that no divorce was decreed.[1] But one who harbors another man's wife for illicit purposes is a wrong-doer, and cannot recover for her maintenance, even though she had fled from her own husband's cruelty.[2]

§ 67. **Wife's Necessaries where Spouses live apart; Subject continued.** — There is a *dictum* of Lord Holt to be found in an old case (or rather in the reporter's note), which sometimes finds its way to the text-books; namely, that, if a husband receives back his wife, he becomes liable for her debts contracted during the whole period of her unauthorized absence.[3] This seems very unreasonable, where the fault was on her part. The true doctrine is, doubtless, that after such reconciliation the husband is liable upon her subsequent contracts only. And this is the rule expressly asserted in some American cases.[4]

The destitute wife of a lunatic living separate from her in an asylum may yet pledge his credit for necessaries;[5] though not, of course, for what she does not need, as where, for example she receives sufficient income out of his estate.[6]

[1] Needham *v.* Bremner, L. R. 1 C. P. 583.

[2] Almy *v.* Wilcox, 110 Mass. 443.

[3] Robison *v.* Gosnold, 6 Mod. 171. See Bing. Inf. 190, *n.*, Am. ed.

[4] Williams *v.* Prince, 3 Strobh. 490; Reese *v.* Chilton, 26 Mo. 508; Oinson *v.* Heritage, 45 Ind. 73. See also Chitty Contr. 168; Williams *v.* McGahay, 12 Johns. 293.

How far the wife can contract liability for necessaries in her own person, when the husband is discharged by her delinquency, was considered in the case of Marshall *v.* Rutton, 8 T. R. 547. Lord Kenyon observed that it was not a necessary consequence of the determination of the husband's responsibility that the wife should be at liberty to act as a *feme sole;* but that the contrary was the truth; and that any persons knowing her condition, who chose to trust her, could not complain if they found themselves unable to sue her. But these remarks are very cautiously put; and it seems reasonable to suppose, as Justice Buller expresses himself in the case upon which Lord Kenyon commented, that the wife would become liable therefor; certainly if she represented herself as a single woman. Cox *v.* Kitchin, 1 B. & P. 339; Childress *v.* Mann, 33 Ala. 206; McHenry *v.* Davies, L. R. 10 Eq. 88. See ch. 12, *post*, as to wife's necessaries under modern legislation.

[5] Reed *v.* Legard, 4 E. L. & Eq. 523; Shaw *v.* Thompson, 16 Pick. 198.

[6] Chappell *v.* Nunn, 41 L. T. N. S. 287; Richardson *v.* Du Bois, L. R. 5 Q. B. 51.

She cannot pledge, it might seem, where he is banished or in prison, provided the law recognize her as *feme sole*;[1] but as an agent of necessity, and to compel his marital obligation, she ought to be permitted to do so if she desires, and not unfrequently does, where he is in jail or prison.[2] If the wife be in an insane asylum, the husband is not the less liable for her support.[3] But not where she is in prison.[4] And it seems that under circumstances of misconduct on the wife's part the husband may compel her to assent, after her release from confinement, to live separate on an allowance, without being chargeable for her support as one who has turned his wife out of doors.[5]

§ 68. **Wife's Necessaries where Spouses live apart; Mutual Separation.** — But besides involuntary separation, there is the case of voluntary separation to be considered. This last, now so frequent, the law tolerates, but does not favor. The rule is, that where a husband and wife parted by mutual consent, and a suitable allowance is furnished the wife, the husband is not bound to pay any bills which she may have contracted as his agent.[6] It is enough that the separation be a matter of common reputation where he resides. But to this allowance two things are requisite: first, that it shall be really sufficient for the wife; second, that it shall be regularly paid. If either requirement be wanting, — a fact which the seller must ascertain at his peril, — the wife is not confined to her remedy on the deed of separation, if any, but may pledge her husband's credit. As to the first requirement, the question is not whether the wife consented to accept a certain allowance as sufficient for her support, but whether it be actually

[1] Reeve Dom. Rel. 86.

[2] See Ahern *v.* Easterby, 42 Conn. 546. The husband is liable for his wife's necessaries, even though she has been declared a *feme sole* trader. Markley *v.* Wartman, 9 Phila. 236.

[3] Wray *v.* Wray, 33 Ala. 187. And see Alna *v.* Plummer, 4 Greenl. 258; Wray *v.* Cox, 24 Ala. 337; Brookfield *v.* Allen, 6 Allen, 585.

[4] 2 Stra. 1122; Bates *v.* Enright, 42 Me. 105.

[5] Wray *v.* Wray, 33 Ala. 187; Brookfield *v.* Allen, 585.

[6] 8 Car. & P. 717; 1 Salk. 116; 1 Ld. Raym. 444; Hindley *v.* Westmeath, 6 B. & C. 200; Mizen *v.* Pick, 3 M. & W. 481; Schoul. Hus. & Wife, § 117; Calkins *v.* Long, 22 Barb. 97; Kemp *v.* Downham, 5 Harring. 417; Caney *v.* Patton, 2 Ashm. 140; Baker *v.* Barney, 8 Johns. 72.

sufficient in the opinion of the jury.[1] As to the second, the mere covenant or contract of the husband to pay separate maintenance will not discharge him from liability for necessaries; for, as was observed in a leading case, "the common law does not relieve any man from an obligation on the mere ground of an agreement to do something else in the place, unless that agreement be performed."[2]

If wife and husband part by mutual consent, and there is no allowance to the wife, it may be presumed that the wife has the right to pledge her husband's credit, for he has not relieved himself of his marital obligation.[3] It is immaterial whether the wife's allowance be secured by deed or not, since it is the payment which discharges him.[4]

But on account of the increasing favor with which separation deeds are held, allowance of maintenance by a formal separation deed appears under the latest English decisions to be treated with so great respect as to be deemed conclusive of the extent and method of a husband's liability for his wife's support during their separation.[5]

§ 69. **Wife's Necessaries where Spouses live apart; Presumptions; Good Faith.** — It has generally been understood that whenever husband and wife separate, under circumstances showing misconduct on the part of either, the presumption of agency changes sides. The fact of their living apart is of itself a caution to all who hold dealings with a married pair. While they cohabit it is usually for the husband to show a want of authority; when they cease to cohabit the seller must prove authority; that is to say, he must prove

[1] Thompson *v.* Harvey, 4 Burr. 2177; Hodgkinson *v.* Fletcher, 4 Camp. N. P. 70; Pearson *v.* Darrington, 32 Ala. 227; Liddlow *v.* Wilmot, 2 Starkie, 77; Emmet *v.* Norton, 8 Car. & P. 506.

[2] Nurse *v.* Craig, 5 B. & P. 148, per Heath, J.; Hindley *v.* Westmeath, 6 B. & C. 200; Lockwood *v.* Thomas, 12 Johns. 248; Kimball *v.* Keyes, 11 Wend. 33.

[3] Ross *v.* Ross, 69 Ill. 569.

[4] Hodgkinson *v.* Fletcher, 4 Camp. 70; Emery *v.* Neighbour, 2 Halst. 142; Holden *v.* Cope, 2 Car. & K. 437. But see Ewers *v.* Hutton, 3 Esp. 255.

[5] Eastland *v.* Burchell, L. R. 3 Q. B. D. 432. *Qu.* whether the wife has any remedy afforded her under such circumstances for procuring the maintenance which it continues the husband's duty to render. Lush, J., in this case seems to rest the wife's general right to pledge her husband's credit too exclusively upon the doctrine of agency. See § 70, *post.*

that the wife was in need of the goods, that the husband failed to supply her, and that the wife was not at fault. *Prima facie*, therefore, a woman living apart from her husband, upon either voluntary or involuntary separation,[1] has no authority to bind him.[2] This contrast of presumptions is subject to the new English doctrine lately commented upon, which seems to put all new tradesmen on their guard in their first dealings with a married woman.[3] Where the husband is merely absent from home for temporary purposes, the wife's presumed authority continues.[4] And where the fact of separation is not commonly known, or where, by occasional visits, the husband keeps up the appearance of cohabitation with his wife, he has generally been considered *prima facie* liable as before ;[5] though notice of an allowance is notice of his dissent to the wife's contracts.[6] He may agree with the wife's tradesman, while living apart from her, that the goods supplied shall not be charged to him ; and to such special agreement the tradesman will be held.[7]

Courts will always regard the rule of good faith in matters relative to the wife's necessaries. Thus if the husband and wife be living apart without the husband's fault, and he wishes to terminate his liability by requesting her to return home, his conduct must show sincerity ; though, if his intentions are *bona fide*, and he makes suitable provision at his own home, the wife forfeits all claim to further support by refusing to return.[8]

§ 70. **Wife's Necessaries ; Summary of Doctrine.** — The common-law doctrine, as we have seen, makes the ground of the husband's liability for his wife's necessaries essentially that

[1] Johnston *v.* Sumner, 3 Hurl. & Nor. 261, per Pollock, C. B., and authorities there commented upon.

[2] Etherington *v.* Parrott, 2 Ld. Raym. 1006 ; Montague *v.* Benedict, 3 B. & C. 631 ; Walker *v.* Simpson, 7 W. & S. 83 ; Mitchell *v.* Treanor, 11 Ga. 324 ; Rea *v.* Durkee, 25 Ill. 503 ; Schoul. Hus. & Wife, § 119 ; Stevens *v.* Story, 43 Vt. 327 ; Sturtevant *v.* Starin, 19 Wis. 268.

[3] *Supra*, § 63 ; Debenham *v.* Mellon, L. R. 5 Q. B. D. 394.

[4] Frost *v.* Willis, 13 Vt. 202.

[5] Rawlins *v.* Vandyke, 3 Esp. 250, per Lord Eldon.

[6] Hinton *v.* Hudson, Freem. 248 ; Kimball *v.* Keyes, 11 Wend. 33.

[7] Dixon *v.* Hurrell, 8 Car. & P. 717.

[8] Walker *v.* Laighton, 11 Foster, 111. And see Cartwright *v.* Bate, 1 Allen, 514.

of agency. This agency is stated as an agency of necessity where a deserving wife stands in want of supplies because of her husband's misconduct. But in truth such necessity transcends all the analogies of an authorized representation, and inasmuch as the wife has no property and is legally dependent on her husband, a right to supply her wants upon his credit is inferred from the nature of her situation. When both spouses live together, the wife may pledge her husband's credit for necessaries, unless he supplies them otherwise, and so performs his duty after his own method; if they separate, his liability continues commensurate with his obligation, so that she can only pledge his credit when the fault was not her own, but, being justified in her conduct, the conjugal right to necessaries is perfect, and consequently enforceable in this manner, unless he performs his duty after his own method. The discrepancy of the cases relates chiefly to presumptions in favor of the person who supplies the necessaries; and here, as we have seen, the latest decisions leave it in doubt how strong a presumption cohabitation as husband and wife furnishes by itself. Formerly it was thought that private arrangements between husband and wife, where they lived together, could not be set up against the seller who had no notice thereof; but latterly the English inclination has been, as we have seen,[1] to limit the implied agency of the wife, during cohabitation, to those whose dealings have already been recognized by the husband, and who therefore ought to have notice of revocation; which rule of course narrows down the presumption. Whatever presumption of authority may be inferred from cohabitation, separation raises the counter-presumption that the wife has no authority to pledge her husband's credit. Upon the whole, to reconcile the earlier and later decisions, the wife's right of procuring necessaries on her husband's credit may be deduced from these two combined considerations: (1) That where the husband proves remiss in furnishing needful support, the wife has the right to compel such support by pledging his credit, whether they cohabit or dwell apart, so long

[1] *Supra*, § 63.

as misconduct on her part has not absolved him from the conjugal duty, — this rule of compulsion taking largely the place, in modern times, of the old remedies formerly pursued in the ecclesiastical courts; (2) That any wife may be the agent of her husband and bind him to the extent of her authority, like other representatives. In short, the rule of agency as to wife's necessaries is carried far enough in actual practice to make that agency a fiction for the sake of a wife's self-protection against her unfaithful spouse.[1]

We may add that the husband's express contract with others, or his express promise or express sanction comes in aid of such legal inference concerning his liability for supplies furnished his wife, as may be drawn from any of the matrimonial situations which we have considered.[2]

§ 71. **Wife's Necessaries; Miscellaneous Points.** — Marriage *de facto*, or reputed marriage, is always sufficient to charge the husband with his wife's necessaries. There seem to be three reasons why this should be so: one, that a tradesman cannot be expected to inquire into such matters; another, that agency binds any principal; the third, that it is just that a man who holds out a woman to society as his wife should maintain her as such. Hence an agency is to be inferred wherever there is cohabitation of parties as husband and wife; though not, it would appear, where the cohabitation is irregular and calculated to raise a different impression, and strong proof of actual authority bestowed is not furnished.[3]

[1] That agency is not the full measure of the wife's power to bind her husband for what she needs is further seen in the decisions upon the point of a wife's legal expenses already noticed. *Supra*, § 61, *n.* Here there is some confusion in the decisions; but a disposition very clear is shown by the courts to allow the wife in numerous instances to prosecute or defend in furtherance of her marital rights, even though it be against the husband himself. Inconsistently enough, the fiction of agency as to necessaries has been here employed; but the true ground is rather that the wife is permitted to maintain her rights against an unfaithful husband in self-protection. The English courts included articles of peace against the husband under necessaries. *Supra*, § 61, *n.* But they stopped short at indictment of the husband for assault. *Supra*, § 61, *n.*

[2] See *e. g.* Daubney *v.* Hughes, 60 N. Y. 187. Any notice intended to terminate the continuance of an express contract must, in order to be effectual, be appropriate thereto. *Ib.* And see Mickelberry *v.* Harvey, 58 Ind. 523.

[3] 2 Esp. 637. And see 1 Greenl. Evid. § 207; 1 Camp. 245; Jewsbury *v.* Newbold, 40 E. L. & Eq. 518; Munroe

An adult husband is bound on the contract of his minor wife for necessaries.[1] And a minor husband is liable for necessaries furnished his wife, whether she be minor or adult.[2] The ordinary rules of husband and wife, therefore, apply so far as such necessaries are concerned. If old enough to contract marriage, an infant is presumed old enough to pay for his wife's board and lodging as well as his own.[3] But with regard to his wife's general contracts it would seem that infancy, which incapacitates him from making contracts in person, also disqualifies him from employing an attorney.

As an agent duly authorized, the wife may doubtless pledge her husband's credit for the necessaries of the children, as well as her own. But upon the doctrine of presumptions and an implied authority from him to do so, the common law is more reserved. "Family necessaries" is an expression of our later statutes which indicates a growing favor in that direction, and modern custom may, of course, extend the implied scope of an agency beyond earlier usage.[4]

But as the obligation of a husband to support does not extend beyond his wife and own children, nor even to stepchildren, a wife cannot ordinarily make a binding contract to support her own parent, brother, sister, or near relatives, either at his expense or her own, since she is neither *sui juris* nor presumably his agent for that purpose.[5]

Policy has regarded parental claims for necessaries furnished to a wife with great distrust. Such claims may doubtless accrue under an express contract.[6] But the law will not ordinarily imply a contract, as against a son-in-law, to pay his wife's board while staying at her father's house. Some of the latest cases, nevertheless, imply a promise on the husband's part to pay his wife's board, where she goes to her parent's house upon a mutual understanding that she may stay there

v. De Chemant, 4 Camp. 215; Schoul. Hus. & Wife, § 122.

[1] Nicholson *v.* Wilborn, 13 Ga. 467

[2] Cantine *v.* Phillips, 5 Harring. 428. And see Bush *v.* Lindsey, 14 Ga. 687.

[3] *Ib.*

[4] See legislative changes, *post.* And see Cook *v.* Ligon, 54 Miss. 368; Powers *v.* Russell, 26 Mich. 179.

[5] Olney *v.* Howe, 89 Ill. 556.

[6] Daubney *v.* Hughes, 60 N. Y. 187.

indefinitely, the spouses having quarrelled.[1] With the growing laxity of the marriage union, the parent's intervention on a daughter's behalf against her husband, with the view of procuring her divorce, and boarding her at the husband's cost meantime, is, unhappily, becoming far more common than formerly, and more readily encouraged by the courts.

The reader has perceived that the claim for a wife's necessaries involves two elements: articles furnished must be of the suitable class, such as food, dress, or medical attendance; and, furthermore, of that class the wife must be destitute of such supply as befits her condition and the means and station of her husband. Hence a blending of law and fact; and hence, moreover, much confusion in laying down the rules, though a tradesman has not always to inquire strictly. Where one has supplied the wife with articles, some of which are necessaries and some are not, some of which were rightly furnished her and some of which were not, he can yet recover for the necessaries, or for what he rightly furnished.[2] But on the other hand, one cannot furnish articles which were not necessaries and not suitable, and recover a fraction of their value on the plea that they might have answered the purpose of other articles which would have been necessaries.[3]

§ 72. **Wife's General Agency for her Husband.** — The wife may bind her husband for other contracts than those for necessaries, where an agency in the premises, express or implied, can be shown. The natural incapacities of her sex superadded to those of the marriage state, the practical difficulties which persons dealing through such an agent must encounter, particularly where they find she had exceeded her authority, and yet cannot hold her liable in person, her own exposure to fraud, deceit, and coercion, — all these combine to render the wife an undesirable business representative; and cases of this sort come rarely before the courts. But the wife may be

[1] Burkett *v.* Trowbridge, 61 Me 251; Daubney *v.* Hughes, 60 N. Y. 187; Schoul. Hus & Wife, § 124. As to wife's own claims, raising funds, &c., see Schoul Hus. & Wife, § 125.

[2] Eames *v.* Sweetser, 101 Mass. 78; Roberts *v.* Kelley, 51 Vt. 97.

[3] Thorpe *v.* Shapleigh, 67 Me. 235.

delegated an attorney, even under a sealed instrument.[1] And on principle there is little reason to doubt her capacity to bind her husband in all general transactions where he has given an express authority. So, too, her agency may be inferred from his acts and conduct respecting her; and the general rule applies that such agency is to be measured by the scope of the usual employment.[2] It is by virtue of such an extended agency that we find a married woman enabled frequently to pledge her husband's credit beyond all ordinary rules as to a wife's necessaries. The usual cases in which a wife binds the husband on contracts not for necessaries may be reduced to two classes: the one where the nature of his employment is such that the wife is expected to share in it; the other where he is absent from home, and some one must carry on the household and small business matters.[3]

Thus, it is held that where a husband permits his wife to carry on a certain business in his name, and to draw in his name checks and notes to be used in the course of the business, she cannot make him liable as surety for loans to third persons, or upon accommodation paper, merely because of such an agency.[4] And where her agency extends only to the performance of certain specific acts of a general transaction, she cannot bind him by her acts and admissions respecting other matters connected with the general transaction.[5] The husband may, by suitable conduct, make his wife his agent for receiving settlement of claims due him while absent;[6] or for employing legal assistance as incidental to managing his affairs.[7] The wife may be her husband's agent as to his real estate, not only for the purpose of collecting rents and making small repairs, but in the more important transactions. But as deeds and written instruments are here

[1] Goodwin *v.* Kelly, 42 Barb. 194.

[2] Cox *v.* Hoffman, 4 Dev. & Batt. 180; Mackinley *v.* McGregor, 3 Whart. 369; Camelin *v.* Palmer Co., 10 Allen, 539; Ruddock *v.* Marsh, 38 E. L. & Eq. 515; Pickering *v.* Pickering, 6 N. H. 124; Gray *v.* Otis, 11 Vt. 628; Miller *v.* Delamater, 12 Wend. 433; Mickelberry *v.* Harvey, 58 Ind. 523.

[3] See this doctrine discussed at length, with citation of cases, in Schoul. Hus. & Wife, §§ 127–130.

[4] Gulick *v.* Grover, 2 Vroom, 182; 4 Vroom, 463.

[5] Goodrich *v.* Tracy, 43 Vt. 314.

[6] Stall *v.* Meek, 70 Penn. St. 181. See Meader *v.* Page, 39 Vt. 306.

[7] Buford *v.* Speed, 11 Bush, 338.

commonly requisite, and formalities must be followed, little can be left to inference. Such authority presupposes usually a husband's long absence. Thus the management of a farm in a husband's absence, with the care of the stock, is not unfrequently entrusted to the wife.[1] It is not to be presumed that a wife can revoke her husband's license on his premises, given to a third person,[2] nor grant an irrevocable license thereon.[3] The wife may represent her husband, not only in the general management of his own lands, so as to bind him, but, under certain circumstances, with reference to her real estate in which he has the usual marital rights, or lands owned partly by her and partly by him.[4]

Ratification by the husband is not essential where the scope of the wife's agency was sufficient without it;[5] but it cures acts of doubtful authority. The wife's sale or gift of her husband's personal property, even without authority, or her purchase on his behalf, may be confirmed by his subsequent acts amounting to ratification; and one mode of ratification is to accept knowingly the benefits of her transaction.[6] Acts done by the wife in relation to her husband's property without authority should of course be promptly disavowed by him within a reasonable time, if he wishes to escape responsibility.[7] Nor can a husband stand by and see his wife use the proceeds of a sale of his property sold by her with his knowledge, and afterwards reclaim the property.[8]

§ 73. **Effect of Marriage of Debtor and Creditor,** — A debt or obligation due a woman is extinguished, not suspended, at common law, by her marriage with the debtor or obligor, and she cannot recover the same against him or his estate after the relation is ended.[9] So, too, where the woman is debtor

[1] Chunot *v.* Larson, 43 Wis. 536; McAfee *v.* Robertson, 41 Tex. 355.

[2] Kellogg *v.* Robinson, 32 Conn. 335.

[3] Nelson *v.* Garey, 114 Mass. 418.

[4] Cheney *v.* Pierce, 38 Vt. 515; Dresel *v.* Jordan, 104 Mass. 407.

[5] See McAfee *v.* Robertson, 41 Tex. 355.

[6] Dunnahoe *v.* Williams, 24 Ark. 264; Mickelberry *v.* Harvey, 58 Ind. 523; Pike *v.* Baker, 53 Ill. 163; Shaw *v.* Emery, 38 Me. 484; *supra*, § 64. Even a trifling gift from the wife by way of charity has been upheld, though without the husband's permission. Spencer *v.* Storrs, 38 Vt. 156

[7] Hill *v.* Sewald, 53 Penn. St. 271.

[8] Delano *v.* Blanchard, 52 Vt. 578; Huff *v.* Price, 50 Mo. 228.

[9] Smiley *v.* Smiley, 18 Ohio St. 543.

and marries the creditor, the debt against her is discharged. These doctrines are subject to the exception that this must not affect the rights of third parties.[1]

CHAPTER IV.

EFFECT OF COVERTURE UPON THE WIFE'S INJURIES AND FRAUDS.

§ 74. **General Principle Stated.** — Frauds and injuries may have been committed by the wife; or they may have been committed upon the wife. Again, they may have been committed before coverture; or they may have been committed during coverture. Once more, they may have reference to the person; constituting a bodily injury, such as assault and battery, or an injury to the character, such as slander; or they may have reference to property. But in any event, so far as the fraud or injury is made the subject of a civil suit, the general principle of the wife's disability remains the same; namely, that the husband compensates or receives the compensation.

§ 75. **Torts by the Wife: Husband and Wife sued together, or Husband alone; Presumption of Coercion, &c** — We have seen that one spouse is not criminally answerable for the other.[2] But as to private wrongs or torts, the general rule of law is that the husband is liable for the frauds and injuries of the wife, whether committed before or during coverture; if committed under his coercion or by him alone, he, and he alone, is liable; otherwise, both are, for the time being, liable.[3] Where the fraud or injury is committed in his com-

[1] As to indorsement or assignment of such a debt, or its evidence before marriage, cf. Guptil *v.* Horne, 63 Me. 405; Long *v.* Kinney, 49 Ind. 235. And see Price *v.* Price, L. R. 11 Ch. D. 163.

[2] *Supra*, § 49.

[3] 2 Kent Com. 149; Bing. Inf. 256, 257: Angel *v.* Felton, 8 Johns. 149; Gage *v.* Reed, 15 Ill. 403; Carl *v.* Wonder, 5 Watts, 97; Whitman *v.* Delano, 6 N. H. 543; Gray *v.* Thacker, 4 Ala. 136; McKeown *v.* Johnson, 1 McCord, 578; Benjamin *v.* Bartlett, 3 Miss. 86; Wright *v.* Kerr, Addis. 13; Cassin *v.* Delany, 38 N. Y. 178; Ball *v.* Bennett, 21 Ind. 427; Marshall *v.* Oakes, 51 Me. 308; Clark *v.* Bayer, 32 Ohio St. 299.

pany and by his order, coercion is presumed, and the husband becomes, *prima facie*, the only wrong-doer; and where committed without his order and in his absence, the wife is in reality the offending party, while the husband has become responsible for her acts by reason of her coverture. In the latter class of cases the husband is properly joined with his wife in the suit; for, if the wife alone were sued, his property might be seized without giving him an opportunity for defence; and if the husband alone were sued, he would become chargeable absolutely. In the former class of cases the husband should be sued alone.[1] Where the tort is committed by both spouses, and the wife does not act by coercion, both husband and wife may be jointly sued.[2]

This presumption of coercion, too, is much the same in civil as in criminal offences.[3] It is said by Chancellor Kent that a wrong committed by the wife "in company with" her husband, or "by his order," renders the husband alone liable; but this statement is too general and should be limited to the case of her acting by his coercion.[4] It is said that the privilege of presumptive coercion extends to no other person than a wife, not even to a servant.[5] The presence of the husband and his direction should usually be concurrent, in order to amount to coercion; and the presumption of a wife's coercion in a tort is, of course, not conclusive, but may be controlled by evidence of the facts.[6]

As to private wrongs the question occurs, why should the husband be made to stand in the wife's place where the offence is considered against an individual, any more than when it is between herself and the State. This seems to be the true answer, as in case of her debts *dum sola;* namely,

[1] Park *v.* Hopkins, 2 Bailey, 411; Matthews *v.* Fiestel, 2 E. D. Smith, 90; Jackson *v.* Kirby, 37 Vt. 448.

[2] 12 Mod. 246; Vine *v.* Saunders, 5 Scott, 359; Marshall *v.* Oakes, 51 Me. 308; Gray, C. J., in Handy *v.* Foley, 121 Mass. 259.

[3] *Supra*, § 50.

[4] Gray, C. J., in Handy *v.* Foley, 121 Mass. 259; 2 Kent Com. 149.

[5] Reeve Dom. Rel. 72; Barnes *v.* Harris, Busbee, 15; Griffin *v.* Reynolds, 17 How. (U. S.) 609.

[6] Cassin *v.* Delany, 38 N. Y. 178; Ferguson *v.* Brooks, 67 Me. 251; *supra* § 50. Coercion, if relied upon, should be set up in defence. See Clark *v.* Bayer, 32 Ohio St. 299; Ferguson *v.* Brooks, 67 Me. 251.

that the husband adopts her and her circumstances together; that he takes her fortune, if she has one, and assumes all possible liabilities therefrom.

This statement suggests that the husband's liability is after all a limited one, where he, in the first instance, was free from wrong; that is to say, that the death of the wife before the recovery of damages puts an end to his liability altogether. This is correct, not only on the principle announced in the case of the wife's debts *dum sola*, but because wrongs, being personal, die with the person, which last is the common explanation of this rule. If the husband dies before damages are recovered in the suit, the wife alone remains liable.[1] So it would seem that the common law recognizes a liability on her part which continues through the marriage relation; coverture operating, however, so as to suspend the remedy against the married woman, and to bring in as a joint party the custodian of her fortune.[2]

§ 76. **Torts by Wife which are based on Contract.** — There are, however, not only *torts simpliciter*, or simple wrongs at law, but wrongs where the substantive basis of the fraud is the wife's contract. The common law has been supposed to apply with the same force in both cases, partly because in the latter instance the person injured would be otherwise without a remedy.[3] But some modern cases rule that though the husband is liable for the wife's general frauds, yet when the

[1] 2 Bright Hus. & Wife, 22 *n.*; and see Stroop *v.* Swarts, 12 S. & R. 76.

[2] Hence husband and wife are sued together for the libel or slander of the wife. McElfresh *v.* Kirkendall, 36 Iowa, 224. Exemplary damages may be allowed in such action. Fowler *v.* Chichester, 26 Ohio St. 9. And generally for forfeitures under a penal statute where she participated. Austin *v.* Wilson, 4 Cush. 273; McQueen *v.* Fulgham, 27 Tex. 463; Baker *v.* Young, 44 Ill. 42; Enders *v.* Beck, 18 Iowa, 86. As to suits to recover penalties for usury, see Jackson *v.* Kirby, 37 Vt. 448; Porter *v.* Mount, 43 Barb. 422. So, too, for assault and battery. Griffin *v.* Reynolds, 17 How. (U. S.) 609; Roadcap *v.* Sipe, 6 Gratt. 213; Schoul. Hus. & Wife, § 137. Or for the forcible removal of a gate. Handy *v.* Foley, 121 Mass. 259. The fact that the husband is made responsible by the fact of coverture, and did not commit the wrong in person, cannot go in mitigation of damages. Austin *v.* Wilson, 4 Cush. 273.

The husband has full management of the defence. And we need hardly add that he may compromise without his wife's assent. Coolidge *v.* Parris, 8 Ohio St. 594.

[3] Macq. Hus. & Wife, 130, 131; Head *v.* Briscoe, 5 Car. & P. 484, per Tindal, C. J.; Reeve Dom. Rel. 72, 73.

fraud is directly connected with her contract, and is the means of effecting it, and part and parcel of the same transaction, the wife cannot be responsible, nor can the husband be sued for the fraud together with the wife.[1]

There are, however, cases where the wife will bind her husband by her fraudulent representations on the ground of her agency.[2]

§ 77. **Torts committed upon the Wife.** — So far as the husband is injured, his right of action is sole; but where the wife is the meritorious cause of action, the spouses join as plaintiffs. For injuries to the person or character of the wife, therefore, the husband and wife at the common law should sue together.[3] But where the right of action for damages is founded on the prior possession of personal property, the husband must, at common law, sue alone, since his possession is the possession of both.[4] And the joinder of the wife in actions relating to personal property, where the injury was committed after marriage, is good ground of demurrer, or motion to arrest, or even of error after judgment.[5] Whether the same principle applies to property of the wife parted with before marriage is not so clear. This is the rule, however, when the action is for a wrong, which before the marriage was committed in respect to such property.[6] But where the trover is laid before the marriage, and the conversion afterwards, there has been some controversy, the result of which seems to be that the action is well brought, either with or without joining the wife, though the better course doubtless is to join the wife.[7] The principle sought is whether such a

[1] Liverpool Adelphi Loan Association *v.* Fairhurst, 9 Exch. 422.

[2] Taylor *v.* Green, 8 Car. & P. 316; Schoul. Hus. & Wife, § 136. A husband is liable in replevin for his wife's unlawful detention of another's chattels under claim of title in herself. Choen *v.* Porter, 66 Ind. 194. But where there is no collusion apparent, a husband will not be committed for his wife's breach of injunction. Hope *v.* Carnegie, L. R. 7 Eq. 254. For statutory changes as to torts and frauds of the wife, see c. *post*.

[3] Bing. Inf. & Cov. 247, Am. ed., and cases cited.

[4] Bing. Inf. & Cov. 253, and cases cited; Cro. Eliz. 133; 1 Chit. Pl. 93; 1 Salk. 114.

[5] Rawlins *v.* Rounds, 27 Vt. 17.

[6] 3 Rob. Pract. 188; Milner *v.* Milnes, 3 T. R. 627; Fewell *v.* Collins, 1 Const. 207.

[7] Powes *v.* Marshall, 1 Sid. 172;

suit amounts to a disaffirmance of the husband's constructive title to the goods on the marriage.[1]

The damages allowed as compensation for the frauds and injuries sustained by the wife go to the husband, as well as the rest of her personal property, if recovered during his lifetime. But such suits survive to her where she is the meritorious cause of action; and on the death of the husband, pending legal proceedings, the wife may accordingly proceed to

Ayling *v.* Whicher, 6 Ad. & El. 259; Blackborne *v.* Haigh, 2 Lev. 107; 3 Rob. Pract. *supra*. There is some uncertainty on this point, however. See Bac. Abr. Baron & Feme (K.); *contra*, Brown *v.* Fifield, 4 Mich. 322; Wellborn *v.* Weaver, 17 Ga. 267.

[1] As to injuries to the wife's real estate, see *infra*, ch. 6. On these principles it is held that husband and wife must sue together for libel or slanderous words spoken against the latter. Smalley *v.* Anderson, 2 Monr. 56; Davies *v.* Solomon, L. R. 7 Q. B. 112; Throgmorton *v.* Davis, 3 Blackf. 383. These words must be actionable *per se*. See Beach *v.* Ranney, 2 Hill, 309; Saville *v.* Sweeney, 4 B. & Ad. 514; Ryan *v.* Madden, 12 Vt. 51. As to slander of wife charging her with "adultery," see Shafer *v.* Ahalt, 48 Md. 171. Special damage should be shown in order to sustain the action. *Ib.*; Allsop *v.* Allsop, 2 L. T. N. S. 290. Words charging her, while unmarried, with fornication, are actionable. Gibson *v.* Gibson, 43 Wis. 23. Also for battery of the wife. Pillow *v.* Bushnell, 5 Barb 156. Also for injuries sustained by her through the negligence of a common carrier. Heirn *v.* McCaughan, 32 Miss. 17. Also for the malpractice of a physician, even though it afterwards cause her death. Cross *v.* Guthery, 2 Root, 90; Hyatt *v.* Adams, 16 Mich. 180. Also for frauds upon the wife, as in case of an action *qui tam* to recover penalties for a fraudulent conveyance. Fowler *v* Frisbie, 3 Conn. 320. But see Crump *v.* McKay, 8 Jones, 32, as to negligence "sounding in contract," not admitted to be cause of action. Also for malicious prosecution. Laughlin *v.* Eaton, 54 Me. 156. And the rule is the same in all these cases, whether the fraud or injury was committed before or during coverture. But if the wife be a privy to the wrong, or knowingly suffer an injury to be committed upon her, the husband cannot maintain his action; for his right to damages cannot be greater than hers would have been had she remained single. Pillow *v.* Bushnell, 5 Barb. 156. Nor can an action be maintained where the husband instigates the wrong. Tibbs *v.* Brown, 2 Grant's Cases, 39. Nor in slander where the words are not actionable, though the wife become ill in consequence of the slander. Wilson *v.* Goit, 17 N. Y. 442. In a joint action for personal wrong to the wife, the declaration should conclude "to their damage." Horton *v.* Byles, 1 Sid. 387; Smalley *v.* Anderson, 2 Monr. 56. And it is a well-recognized principle, both in England and America, that whenever the wife is the meritorious cause of action, her interest must appear on the face of the pleadings, or the omission will be considered fatal. Staley *v.* Barhite, 2 Caines, 221; Serres *v.* Dodd, 5 B. & P. 405; Thorne *v.* Dillingham, 1 Denio, 254; Pickering *v.* De Rochemont, 45 N. H. 67.

Where the tort was committed before the woman was married, the action, if she marries afterwards, should be brought by husband and wife; or if she marries pending the action, the husband is entitled to be admitted as a plaintiff. Gibson *v.* Gibson, 43 Wis. 23.

judgment and collect the damages for herself; or if her husband had never brought an action, she may then do so in her own right.[1] The husband, on the other hand, has no such interest in the suit at common law that he may prosecute it in his own name after his wife's death. His joinder in the first place was only because of the marriage relation. He may, however, under some statutes, be let in as her administrator, and in such capacity prosecute the suit to its conclusion.[2] If the wife dies after judgment, the husband surviving may take the benefits of the suit; for a judgment debt takes the place of the original cause of action. The death of the wife, pending suit for her personal tort, put an end to the action altogether by the old law.[3] But where the so-called tort is referable rather to some breach of contract, it might survive.[4]

Since the husband is at the common law entitled to the society and services of his wife, two separate causes of action may arise from injuries inflicted upon her person. One, in the name of both for her own injuries, we have just considered; the other is in the name of the husband alone *per quod consortium amisit*.[5] Thus, if the wife be wantonly bruised and maltreated, her husband may bring his special action *per quod* for the loss of her society and for his medical expenses. But there can be no special damage recovered by the husband by way of aggravation in the joint suit for his wife's injuries, which is founded in her meritorious claim. Thus, in the joint action for an assault on the wife, the surgeon's bill cannot be recovered; if for slander of the wife, the loss of wages cannot be claimed; there the sole right of the husband should be sued on in his name.[6] Nor, on the

[1] Bing. Inf. & Cov. 247, 248; Newton *v.* Hatter, 2 Ld. Raym. 1208; Anderson *v.* Anderson, 11 Bush, 327.

[2] Chitty Pl. 74; Norcross *v.* Stuart, 50 Me. 87; Pattee *v.* Harrington, 11 Pick. 221; Crozier *v.* Bryant, 4 Bibb, 174; Saltmarsh *v.* Candia, 51 N. H. 71.

[3] Bac. Abr. Baron & Feme (K.); Meese *v.* Fond du Lac, 48 Wis. 323.

[4] Long *v.* Morrison, 14 Ind. 595.

[5] 3 Bl. Com. 140; Cro. Jac. 501; *ib.* 538; Mewhirter *v.* Hatten, 42 Iowa, 288; Brockbank *v.* Whitehaven Junction R. R. Co., 7 Hurl. & Nor. 834; Whitcomb *v.* Barre, 37 Vt. 148; Kavanaugh *v.* Janesville, 24 Wis. 618; Hooper *v.* Haskell, 56 Me. 251.

[6] Dengate *v.* Gardiner, 4 M & W. 6; Kavanaugh *v.* Janesville, 24 Wis. 618; King *v.* Thompson, 87 Penn. St.

other hand, can the husband recover for the wife's mental anguish or other damages incidental to the joint suit in his sole suit for damages.[1] It would appear that the husband may release the damages for his wife's injuries, and then recover for the loss arising to himself alone; he may certainly release or compromise.[2] Where the husband is alone entitled to the damages, and in case of his death they would go to his representatives, he must sue alone; and his sole suit will not be defeated by his wife's death before action brought.[3]

Of the suits which the husband may bring for loss of his wife's society, that for enticing a wife away has already been considered.[4] Somewhat akin to this is his action for his wife's seduction, founded on the same general marital rights. But the common law still keeps up its legal fiction of the wife's civil incapacity, and treats the seducer as guilty of trespass by force of arms, whether the wife actually consent to the guilt or not.[5] A husband who lives apart from his wife, under articles of separation or a decree of divorce from bed and board, cannot maintain a suit for damages *per quod*, since he has suffered no loss of her society.[6] The wife was never permitted to sue for the loss of her husband's society and services,[7] though on general principle it is hard to see why, save for her coverture, she should not have been.

§ 78. **Torts upon the Wife; Instantaneous Death; Statutes.** — Instantaneous death of the husband or wife, at the common law, gave no right of action to the survivor. Nor could

365. See Lewis *v.* Babcock, 18 Johns. 443.

[1] Hooper *v.* Haskell, 56 Me. 251.

[2] Southworth *v.* Packard, 7 Mass. 95; Anderson *v.* Anderson, 11 Bush, 327.

[3] Wheeling *v.* Trowbridge, 5 W. Va. 353.

[4] *Supra*, § 41. As to this seduction suit, see Schoul. Hus. & Wife, § 140.

[5] 3 Bl. Com. 139, 140. An action on the case is allowable, though not usual. Chamberlain *v.* Hazlewood, 5 M. & W. 517.

[6] Schoul. Hus. & Wife, § 140; Fry *v.* Derstler, 2 Yeates, 278; Ballard *v.* Russell, 36 Me. 196; Burger *v.* Belsley, 45 Ill. 72.

[7] 2 Kent Com. 182; Tuttle *v.* Chicago R., 42 Iowa, 518; Carey *v.* Berkshire R., 1 Cush. 475. An action cannot in general be maintained by the wife, there being no misfeasance towards her independently of a contract with the husband alone. Longmeid *v.* Holliday, 6 Exch. 761.

the husband, whose wife was thus killed by another's carelessness, sue *per quod*, because he could not be said to have lost her society during any portion of her life.[1] A wife, of course, could not sue for the death of her husband.[2] Where the wife dies in consequence of one's carelessness, as in case of malpractice, the husband may recover damages for the injury accruing to himself before, but not for the injury in consequence of, the death.[3] Modern legislation has supplied many new remedies much needed in these classes of cases, particularly with reference to injuries and loss of life occasioned through the carelessness of railroad companies and other common carriers.[4]

§ 79. **Torts upon the Wife; Miscellaneous Points.** — It should be observed that, wherever husband and wife are both injured, they have two distinct and separate causes of action, which must not be confounded. Thus, for libel against husband and wife, the husband must sue alone for the libel against him, and husband and wife jointly for the libel against her; they cannot sue together for the libel

[1] Yelv. 89, 90; Baker *v.* Bolton, 1 Camp. 493; Green *v.* Hudson R. R. Co., 28 Barb. 9: Hallenbeck *v.* Berkshire R. R. Co., 9 Cush. 109. See Georgia R. R. Co. *v.* Wynn, 42 Geo. 331, which considers a statute providing only for a wife's suit by reason of her husband's death, by railroad accident, and not for a husband's suit by reason of his wife's death.

[2] 2 Kent Com. 182; Carey *v.* Berkshire R., 1 Cush. 475.

[3] Hyatt *v.* Adams, 16 Mich. 180; Long *v.* Morrison, 14 Ind. 595.

[4] Dickens *v.* N. Y. Central R. R. Co. 28 Barb. 41; Stat. 9 & 10 Vict. c. 93; Mass. Gen. Stats. c. 63, § 97. And wherever by special statute some right of action for damages is given (as against a town for a defective highway), some of our courts seem disposed to allow the husband's medical expenses by way of aggravation, in the joint suit of husband and wife, even though he may not be empowered to bring a suit in his own name to recover for them as damages *per quod*. Harwood *v.* Lowell, 4 Cush. 310; Sanford *v.* Augusta, 32 Me. 536; Hunt *v.* Winfield, 36 Wis. 154; Fuller *v.* Naugatuck R. R. Co., 21 Conn. 557. See Carlisle *v.* Town of Sheldon, 38 Vt. 440. In some of these statutory cases, however, the husband may bring his separate suit *per quod* as before, in addition to the suit for the wife's injury. Klein *v.* Jewett, 26 N. J. Eq. 474; Kavanaugh *v.* Janesville, 24 Wis. 618; Whitcomb *v.* Barre, 37 Vt. 148.

Where husband and wife were injured simultaneously, and both died, the husband a little before the wife, it was held that the right of action vested absolutely in the wife. Waldo *v.* Goodsell, 33 Conn. 462. Where the action is brought in assumpsit, as upon a carrier's contract to carry safely, the considerations are those of contract, not tort. See Pollard *v.* New Jersey R., 101 U. S. Supr. 223.

against both.[1] But actions are sometimes consolidated in practice.[2]

We may notice finally one important distinction made between the wife's general contracts and her frauds and injuries. In the one case the man is held liable to third parties for her acts as agent, even though never married to her;[3] and simple cohabitation is sufficient to charge him. But simple cohabitation will not be enough to make him responsible for her civil injuries. Marriage in fact is essential. And this latter principle applies likewise where he seeks indemnity for her injuries.[4] The facility with which an agency is created at law may serve to explain the difference between the two cases.

CHAPTER V.

EFFECT OF COVERTURE UPON THE WIFE'S PERSONAL PROPERTY.

§ 80. **Wife's Personal Property in General; Marriage a Gift to the Husband.** — Personal property comprises things in possession, or goods and effects, such as money, furniture, and farm stock, which one holds as the property itself, and things in action, such as bonds and other outstanding debts.[5] The husband's title to his wife's personal property at the common law is either absolute or qualified, according as the particular property belongs to the one class or the other. We shall therefore, in this chapter, treat of, *first*, the wife's things or personal property in possession; *second*, her things or personals in action.

[1] Gazynski *v.* Colburn, 11 Cush. 10; Ebersoll *v.* King, 3 Binn. 555; Newton *v.* Hatter, 2 Ld. Raym. 1208. For statutory changes as to injuries sustained by the wife, see c. *post*.

[2] Hemstead *v.* Gas Light Co., 3 Hurl. & C. 745.

[3] *Supra*, § 71.

[4] Overholt *v.* Ellswell, 1 Ashm. 200. See Norwood *v.* Stevenson, Andr. 227.

[5] 2 Bl. Com. 389, 396; 2 Kent Com. 351. See 1 Schoul. Pers. Prop. 32–37, where the leading distinctions between "things in possession" and "things in action" are noticed at length, and where reasons are stated why the terms "corporeal" and "incorporeal" personal property should be preferred at this day.

But in general it may be premised that the wife's personal property goes to the husband, whether belonging to her at the time of marriage, or acquired afterwards by gift, bequest, or purchase; whether actually or beneficially possessed; whether principal fund or income. So her earnings belong to her husband. Marriage, therefore, operates in this respect as a gift to the husband; and while the gift is only qualified, so far as things in action are concerned, it lies in his power to make the gift absolute during coverture.[1]

This privilege of the husband lasts as long as the marriage relation continues, even though he be living apart from his wife in adultery, and she acquire the property by her own labor[2] or by bequest.[3] Neither divorce from bed and board, nor separation, takes away his right.[4] But divorce from the bonds of matrimony, or the death of either party, puts an end to the gifts of coverture, leaving open the adjustment of the rights of the respective parties with one another, or between the survivor and the representatives of the deceased, on other principles to be hereafter explained.

And it is a matter of course that the wife's property should be hers in her own right, in order that the husband's title may attach. For property may come to her with restrictions upon the husband's rights, such as the giver has seen fit to impose.[5] Her *paraphernalia* follow a rule somewhat peculiar.[6] And, as we shall see in later chapters, much of the common law bearing upon this subject is practically superseded by the law of the wife's separate property.

§ 81. **Earnings of Wife vest in Husband.** — Earnings of the wife belong to the husband. The rule of the common law is that he takes all the benefits of her industry.[7] This rule

[1] 1 Bright Hus. & Wife, 34, 35; Co. Litt. 305 *a*, 351 *b*; 2 Kent Com. 130, &c.; Campbell *v.* Galbreath, 12 Bush, 459.

[2] Russell *v.* Brooks, 7 Pick. 65; Turtle *v.* Muncy, 2 J. J. Marsh. 82; Armstrong *v.* Armstrong, 32 Miss. 279.

[3] Vreeland *v.* Ryno, 26 N. J. Eq. 160.

[4] Glover *v.* Proprietors of Drury Lane, 2 Chitty, 117; Washburn *v.* Hale, 10 Pick. 429; Prescott *v.* Brown, 23 Me. 305; 1 Roll. Abr. 343. But see Divorce, *infra*.

[5] Co. Litt. 351; 11 Mod. 178.

[6] See *post*, cs. 15, 16, as to rights upon death of a spouse.

[7] Macq. Hus. & Wife, 44, 45; Reeve Dom. Rel. 63; McDavid *v.* Adams, 77 Ill. 155; Yopst *v.* Yopst, 51 Ind. 61.

applies to money earned, and to other produce of the wife's earnings.[1] He alone can give a discharge for any demand which may arise from her services. He may of course constitute her his agent for receiving the pay to herself; but, without evidence of some such authority, the person who employs her, as a nurse for instance, cannot protect himself by showing her separate receipts.[2] For these earnings the husband sues alone, and in his own name.[3] He may consent that they be her own, but that right rests upon his consent, and raises other questions to be considered hereafter;[4] nor can that consent be exercised in disregard of his existing creditors.[5] It follows that the proceeds of the joint labor of husband and wife belong at common law to the husband; as where, for instance, they raise cotton together.[6]

§ 82. **Wife's Personal Property in Possession.** — Now to take the broad division of the common law as applied to all the wife's personal property. *First*, as to the wife's *choses* or personals in possession, or corporeal personal property. To these the husband's right at common law is immediate and absolute. He may dispose of them as he sees fit during his life, whether with or without his wife's consent; he may bequeath them by will; and after his death such property is regarded as assets of his estate, the title passing to his executors and administrators, to the exclusion of the wife, though she survive him.[7]

If the wife's interest in personal property be that of a tenant in common, the husband becomes a tenant in common in

[1] Bucher *v.* Ream, 68 Penn. St. 421; Hawkins *v.* Providence R., 119 Mass. 596.

[2] Offley *v.* Clay, 2 Man. & Gr. 172; and see Glover *v.* Drury Lane, 2 Chitt. 117; Russell *v.* Brooks, 7 Pick. 65. But see Starrett *v.* Wynn, 17 S. & R. 130.

[3] Gould *v.* Carlton, 55 Me. 511; McDavid *v.* Adams, 77 Ill. 155.

[4] See *post*, c. 12, as to wife's power to trade, &c.

[5] Cramer *v.* Redford, 2 C. E. Green, 367; Postnuptial Settlements, *post*; Glaze *v.* Blake, 56 Ala. 379.

[6] Bowden *v.* Gray, 49 Miss. 547.

[7] Co. Litt. 300, 351 *b*; 2 Kent Com. 143; Legg *v.* Legg, 8 Mass. 99; Lamphir *v.* Creed, 8 Ves. 599; Winslow *v.* Crocker, 17 Me. 29; Bing. Inf. & Cov. 208, cases cited by Am. ed.; Hoskins *v.* Miller, 2 Dev. 360; Hyde *v.* Stone, 9 Cow. 230; Morgan *v.* Thames Bank, 14 Conn. 99; Hawkins *v.* Craig, 6 Monr. 257; Caffee *v.* Kelly, 1 Busb. 48; Skillman *v.* Skillman, 2 Beasley, 403; Hopkins *v.* Carey, 23 Miss. 54; Cropsey *v.* McKinney, 30 Barb. 47; Carleton *v.* Lovejoy, 54 Me. 445.

her stead.[1] So corporeal chattels of a female ward, in the hands of her guardian, being legally hers at the time of marriage, become her husband's, and his marital rights attach at once, notwithstanding the guardian retains possession longer.[2] The wife's vested remainder in personal estate goes to the husband on termination of the particular estate; and where both husband and wife die during the continuance of the particular estate, the husband's representatives, and not the wife's, are held to take such remainder.[3] But the husband cannot be considered a purchaser by marriage for a valuable consideration against a legal title admitted to be valid by his wife before marriage.[4]

Chattels bequeathed to the wife, without restriction, pass to the husband at once like her other things in possession.[5] So all her movables, such as jewels, household goods, furniture, and the like, also cash in her hands, go to him absolutely and at once, whether owned by the wife at the time of marriage or nominally vesting in her at some period of her coverture. Whether money at her banker's follows this same principle may depend upon a distinction first taken by Sir William Grant in *Carr* v. *Carr*.[6] He there says that a balance at a banker's is a debt and not a deposit. But if the money were delivered to the banker in a sealed bag, it would then be truly a *depositum*. It would then have what is called an ear-mark; in other words, it would be a specific chattel, and, as such, would vest by the marriage in the husband as his absolute property.[7] Therefore, should the husband die without recovering such specific chattels or goods, they would belong to his representatives, and not to the wife by right of

[1] Hopper *v.* McWhorter, 18 Ala. 229.

[2] Sallee *v.* Arnold, 32 Mo. 532; Chambers *v.* Perry, 17 Ala. 726; McDaniel *v.* Whitman, 16 Ala. 343; Miller *v.* Blackburn, 14 Ind. 62. And see Davis's Appeal, 60 Penn. St 118.

[3] Tune *v.* Cooper, 4 Sneed, 296.

[4] Willis *v.* Snelling, 6 Rich. 280

[5] Shirley *v.* Shirley, 9 Paige, 363; Newlands *v.* Paynter, 4 M. & C. 408; Crane *v.* Brice, 7 M. & W. 183; Rex *v.* French, R. & R. C. C. 491.

[6] 1 Mer. 543, *n.*

[7] Per Sir William Grant in Carr *v.* Carr, 1 Mer. 543; Hill *v.* Foley, 1 Phil. 404. Money deposited with a banker in the usual way is money lent to the banker, with the obligation superadded that it be repaid when called for. Pott *v.* Cleg, 11 Jur. 289.

survivorship.[1] The true test of the husband's title is this: whether the personal property in question was or was not technically a thing in possession.

As to the wife's personal apparel, the doctrine of *paraphernalia* will be found to reserve to her a needful right in the most delicate instance where controversy can arise. Otherwise it would appear that her apparel belongs to her husband at common law; and he only can sue others for its loss.[2] She cannot sell or give her clothing away, probably, except by virtue of an agency; which agency, however, might be readily inferred from circumstances. But the wife's reasonable clothing belongs to the husband for the wife's use, like her victuals and other necessaries, and he must not wantonly deprive her of it so as to leave her destitute.[3]

§ 83. **Wife's Personalty in Action.** — *Secondly.* The husband's right to his wife's incorporeal personal property — or at least to her *choses in action*, as they are commonly called — is qualified. Marriage operates, not as an absolute gift of such property, but rather as a conditional gift, the condition being that the husband shall do some act, while coverture lasts, to appropriate the *choses* to himself. If he happen to die before he has done so, such *choses*, not having been reduced to possession, remain the property of the wife, and his personal representatives have no title in them.[4] But this applies only to outstanding things in action; for some may have been reduced to possession by the husband during his lifetime, and some may not. If the wife die before the husband has reduced the *chose* to possession, he has no title in it as husband, but it goes, strictly speaking, to her administrator or personal representative,[5] though under our statutes the

[1] Hawkins *v.* Providence R., 119 Mass. 596.

[2] See Delano *v.* Blanchard, 52 Vt. 578; Hawkins *v.* Providence R., 119 Mass. 596.

[3] Powes *v.* Marshall, 1 Sid. 172; Macq. Hus. & Wife, 19, 20; 1 Bac. Abr. 700, tit. Baron & Feme, V.; 1 Roper Hus. & Wife, 169; 1 Vent. 261.

[4] Co. Litt. 351; 1 Bright Hus. & Wife, 36; 2 Kent Com. 135 *et seq*, and cases cited; Scawen *v.* Blunt, 7 Ves. 294; Fleet *v.* Perrins, L. R. 3 Q. B. 536; Langham *v.* Nenny, 3 Ves. 467; Tritt *v.* Colwell, 31 Penn. St. 228; Needles *v.* Needles, 7 Ohio St. 432; Burleigh *v.* Coffin, 2 Fost. 118.

[5] Walker *v.* Walker, 41 Ala. 353; Fleet *v.* Perrins, L. R. 3 Q. B. 536; Scrutton *v.* Pattillo, L. R. 19 Eq. 369.

husband has commonly the right both to administer and inherit a good part, at least, of his wife's personal property, and she cannot will otherwise.[1]

With respect to such *choses in action* as may accrue to the wife solely, or to the husband and wife jointly, during coverture, the same doctrine applies. The husband may disagree to his wife's interest and make his own absolute at any time during coverture by recovering in suit in his own name or otherwise reducing them to possession. But until such disagreement, such *choses in action* belong to the wife, and, if not reduced into possession by the husband, will likewise survive to her.[2]

It becomes important, therefore, at common law, to distinguish the wife's things in action from her things in possession. To the class of things in action belong such property as rests upon obligation, contract, or other security, for payment; and not only rights presently vested and capable of immediate reduction to possession, but those which are contingent upon some event or reversionary upon some prior interest.[3] Debts owing the wife, arrears of rents, of profits, and of income, also outstanding loans, are plainly *choses in action*.[4] Money due on mortgage is, before foreclosure, a *chose in action*, and even though lent before coverture with covenants running to the wife's heirs or executors, it must follow the usual rule.[5] So are bonds and certificates of stock.[6] Income of a *chose in action* is as much a *chose* as the principal itself; and according to the ordinary rule the wife becomes entitled to it by survivorship.[7] A devise of land to be sold

[1] See, as to dissolution by death, *post*.

[2] Coppin *v.* ——, 2 P. Wms. 497; Day *v.* Padrone, 2 M. & S. 396, *n.*; Howell *v.* Maine, 3 Lev. 403; Wildman *v.* Wildman, 9 Ves. 174; 1 Bright Hus. & Wife, 37; 2 Kent Com. 135, and cases cited; Wilkinson *v.* Charlesworth, 11 Jur. 644; Standeford *v.* Devol, 21 Ind. 404. Reduction during the minority of an infant husband is good, though he dies before majority. Ware *v.* Ware, 18 Gratt. 670. As to reduction by the husband of an infant wife, see Shanks *v.* Edmondson, 28 Gratt. 804.

[3] See Bell Hus. & Wife, 52.

[4] 1 Bright Hus. & Wife, 36; Clapp *v.* Stoughton, 10 Pick. 463.

[5] Bell Hus. & Wife, 52; *contra*, Turner *v.* Crane, 1 Vern. 170; Rees *v.* Keith, 11 Sim. 388.

[6] Slaymaker *v.* Bank, 10 Penn. St. 373; Wells *v.* Tyler, 5 Fost. 340.

[7] Wilkinson *v.* Charlsworth, 11 Jur. 644.

and proceeds to be divided among certain persons, gives to each a *chose in action*.[1] Bills of exchange and promissory notes, unlike many *choses in action* in being legally transferable by simple indorsement, are now considered *choses in action* of a peculiar nature, though it was formerly thought that they vested absolutely in the husband by marriage;[2] and bank checks, certificates of deposit,[3] and public securities of a negotiable character,[4] may be placed in the same class. Legacies and distributive shares are sometimes treated as though they vested absolutely in the husband without reduction into possession; but unquestionably the better opinion is that they are *choses in action* (especially if no decree of distribution has been rendered, or the estate is unsettled), in which case the creditor of the husband ought not to be allowed to attach them before the latter has done some act disaffirming his wife's title.[5] The wife's *choses in action* must not be confounded with her goods or specific chattels in the hands of third parties, which, unlike her *choses in action*, vest in the husband absolutely by the marriage.[6] Money rights or claims generally, as for instance a claim for damages growing out of a tort committed upon the person or character of the wife, fall under our present head.[7]

§ 84. **Wife's Personalty in Action; Reduction into Possession.** — What acts on the husband's part amount to an appropriation of his wife's *choses in action*, or, in other words, constitute reduction into possession so as to bar her rights by

[1] Smilie's Estate, 22 Penn. St. 130.

[2] Gaters *v.* Maddeley, 6 M. & W. 423; Nash *v.* Nash, 2 Madd. 133; 1 Roper Hus. & Wife, 211; 1 Bright Hus. & Wife, 37 *a*, 38; 9 Jur. 827; Phelps *v.* Phelps 20 Pick. 556; Lenderman *v.* Talley, 1 Houst. 523.

[3] Rodgers *v.* Pike County Bank, 69 Mo. 560.

[4] Such, for instance, as United States bonds. Brown *v.* Bokee, 53 Md. 155.

[5] 2 Kent Com. 135; Schoul. Hus. & Wife, § 150 and cases cited; Carr *v.* Taylor, 10 Ves. Jr. 574, 578; Lamphir *v.* Creed, 8 *ib.* 599; Palmer *v.* Trevor, 1 Vern. 261. But even in Massachusetts, where the doctrine prevails which is disapproved in the text, it is held that if the husband die before judgment in the suit by creditors, his wife's survivorship is not barred. Strong *v.* Smith, 1 Met. 476. See Parks *v.* Cushman, 9 Vt. 320, which allows the wife's share to be attached in trustee process by the husband's creditors after a decree of distribution.

[6] See *supra*, § 82; 1 Schoul. Pers. Prop. 32–37.

[7] Anderson *v.* Anderson, 11 Bush, 327.

survivorship, is a doctrine of common law of much importance. Mere intention on his part to appropriate is not sufficient. The purpose must be followed by some positive act asserting an ownership.[1] Nor is actual possession of the *chose in action* a sufficient reduction *per se*, for the husband's intention may be to hold it in the right of another. Thus he may take the property in trust for his wife; and if so, he is accountable like any other trustee.[2] So he may receive it as a loan from his wife, in which case he shall refund it like any other borrower. That reduction into possession which makes the *chose* absolutely as well as potentially the husband's, is a reduction into possession, not of the thing itself, but of the title to it.[3] Constructive possessions are not favored in law when they tend to defeat the wife's survivorship. Yet reduction into possession of the wife's *chose in action*, unexplained by other circumstances, is *prima facie* evidence of conversion to the husband's use, and is therefore effectual.[4] And reduction of a fund may be sufficient upon the happening of a condition annexed to it.[5]

The doctrine of reduction into possession offers many very nice distinctions, involving conflicting rights of considerable magnitude. Courts of equity, which have taken this subject under their especial control, seem to lay down variable rules; and it must be confessed that the law of reduction is so built upon exceptions, that one may more readily determine what acts of the husband do not, than what acts do, bar the wife's survivorship. Another difficulty in dealing with this subject appears from the circumstance that personal property is rapidly growing, and species of the incorporeal sort are developed quite unknown to the old common law; while, on the other hand, the doctrine of the wife's separate estate, under the influence of equity and modern legislation, has expanded so fast as to furnish already new elements of con-

[1] Blount *v.* Bestland, 5 Ves. Jr. 515.

[2] Baker *v.* Hall, 12 Ves. Jr. 497; Estate of Hinds, 5 Whart. 138; Mayfield *v.* Clifton, 3 Stew. 375; Resor *v.* Resor, 9 Ind. 347; Bell Hus. & Wife, 57.

[3] Strong, J., in Tritt's Admr. *v.* Caldwell's Admr., 31 Penn St. 233.

[4] Johnston *v.* Johnston, 1 Grant Cas. 468.

[5] Dunn *v.* Sargent, 101 Mass. 336.

sideration for most of the latest reduction cases, threatening to extinguish at no distant day all the old learning on the subject, even before its leading principles could be clearly shaped out in the courts.[1]

§ 85. **Wife's Personalty in Action; Wife's Equity to a Settlement.** — The wife's equity to a settlement, which constitutes an important branch of the English chancery jurisprudence, is closely connected with the husband's right of reduction into possession. Whenever the husband or his representative has to seek the aid of a court of chancery in order to recover his wife's property, he must submit to its order of a suitable settlement from the fund. This settlement, which is made upon the wife for the separate benefit of herself and the children as a provision for their maintenance and comfort, is known as the wife's equity.[2] Thus chancery, by a stretch of power somewhat arbitrary, interferes to do an act of justice. The doctrine seems to rest upon two grounds: first, that whoever comes into equity must do equity; second, that chancery is the special champion of women and children.[3]

The smallness of a fund is no bar to the settlement.[4] The court exercises a liberal discretion in making an award to wife and children, even to the disadvantage of an insolvent husband's creditors.[5] But the right to claim it is personal to the wife, may be barred or waived because of her acts or misconduct, and applies only to funds which have fallen into possession, or are not merely reversionary.[6]

[1] This doctrine of reduction into possession is set forth at length in Schoul. Hus. & Wife, §§ 154–159, with numerous cases cited.

[2] 2 Kent Com. 139–143, and cases cited; 1 Bright Hus. & Wife, 230–265; 2 Story Eq. Juris. § 635 Various acts suffice, conclusive of the husband's intention. *Ib.* §§ 154–156. Reduction into possession by assignment affords many perplexing points. *Ib.* § 157. The husband's right to reduce is one of election. *Ib* § 156. There may be reduction by suit. *Ib.* § 158.

[3] Meals *v.* Meals, 1 Dick. 373; Peachey Mar. Settl. 158, 159. This jurisdiction appears to have been exercised from the earliest period. Sturgis *v.* Champneys, 5 M. & C. 103, per Lord Chancellor Cottenham. For the doctrine of the wife's equity to a settlement in detail, which also gives rise to nice distinctions, see Schoul. Hus. & Wife, §§ 160–162.

[4] Schoul. Hus. & Wife, § 161.

[5] *Ib.* § 161.

[6] *Ib.* §§ 161, 162. An adequate settlement on the wife may bar her equity. *Ib.* § 162.

The wife's right of equity to a settlement is something distinct from her right of survivorship; that is, her right upon her husband's death to property not reduced by him;[1] and even if the husband has assigned the fund, the court will protect such equity upon due application.[2] The husband's assignee for valuable consideration takes subject to the wife's equity, although her survivorship may have been barred by the assignment;[3] but the wife's antenuptial debts must first be provided for.[4]

§ 86. **Personal Property held by Wife as Fiduciary; Wife as Executrix, &c.** — Property held by the wife in a representative capacity at the time of marriage cannot vest in the husband; for here she has no beneficial interest which the law can transfer to her husband.[5] Any other rule would operate a fraud upon creditors and *cestuis que trust*. But if the wife be executrix or administratrix at the time of her marriage, the husband is entitled to administer in her right, by way of partial offset to his liability for her frauds and injuries in such capacity. As incidental to this authority, he may release and compound debts, and dispose of the effects, and reduce outstanding trust property into possession, as his wife might have done before coverture.[6] He is accountable for all property which came to her possession, whether actually received by him or not.[7] A married woman cannot become executrix or administratrix without her husband's concurrence; so long, at least, as he remains liable for her acts;[8] nor will payments

[1] Norris *v.* Lantz, 18 Md. 260; Hall *v.* Hall, 4 Md. Ch. 283.

[2] Osborne *v.* Edwards, 3 Stock. 73.

[3] Moore *v.* Moore, 14 B. Monr. 259; 2 Story Eq. Juris. § 1412, and cases cited. In McCaleb *v.* Crichfield, 5 Heisk. 288, the assignee was held entitled to the residuary interest under a will assigned by husband and wife jointly, no proceedings having been set on foot by the latter during her life to avoid the assignment or enforce her equity.

[4] Barnard *v.* Ford, L. R. 4 Ch. 247.

[5] Co. Litt. 351; 11 Mod. 178; 1 Bright Hus. & Wife, 39, 40.

[6] *Ib.*; Jenk. Rep. 79; Woodruffe *v.* Cox, 2 Bradf. Sur. 153; Keister *v.* Howe, 3 Ind. 268; Claussen *v.* La Franz, 1 Iowa, 226; Dardier *v.* Chapman, L. R. 11 Ch. D. 442. And may foreclose a mortgage with his co-executrix. Buck *v.* Fischer, 2 Col. T. 709.

[7] Scott *v.* Gamble, 1 Stockt. 218. For a case in which the husband put money of his own into a bank where the wife had an account as executrix, see Lloyd *v.* Pughe, L. R. 8 Ch. 88.

[8] Administration has been granted to a wife living apart from her husband under a deed of separation with apt provisions. Goods of Hardinge, 2 Curt. 640.

made to her in such capacity without his assent be valid.[1] It is to be generally observed in cases of this kind that the right of disposition which the husband exercises is strictly the right of performing the trust vested in his wife, it being assumed that she cannot perform it consistently with her situation as a *feme covert*. His position is a fiduciary one, so that he cannot purchase from a coadministratrix without consent of all beneficiaries in interest.[2]

By marriage with a female guardian, too, the husband becomes responsible for the moneys with which she may then or afterwards during coverture be chargeable in such capacity; the responsibility extending while she continues to act, whether it were proper for her to so continue or not.[3]

CHAPTER VI.

EFFECT OF COVERTURE UPON THE WIFE'S CHATTELS REAL AND REAL ESTATE.

§ 87. **Husband's Interest in Wife's Chattels Real, Leases, &c.** — Chattels real, such as leases and terms for years, have many of the incidents of personal property. But as between husband and wife they differ from personal chattels. The title acquired therein by the husband is of a somewhat anomalous

[1] 1 Salk. 282; Lover *v.* Lover, 6 Jur. 156; Bubbers *v.* Hardy, 3 Curt. 50; cases cited in 2 Redf. Wills, 78. As to the indorsement of a note payable to the wife as administratrix, see Roberts *v.* Place, 18 N. H. 183. And see Murphree *v.* Singleton, 37 Ala. 412. Statutes sometimes require the husband to join in the wife's bond as executrix, and otherwise vary the rule of the text. See Schoul. Hus. & Wife, Appendix. See Airhart *v.* Murphy, 32 Tex. 131; Cassedy *v.* Jackson, 45 Miss. 397. Wife made sole executrix with her husband's consent. *In re* Stewart, 56 Me. 300. As to effect on chattels real where wife is executrix, see also *post*, § 87.

[2] Pepperell *v.* Chamberlain, 27 W. R. 410. An administrator cannot sue in his representative character upon contracts made after the death of the intestate merely in the course of carrying on the intestate's business. Hence the husband must sue alone for goods supplied by husband and wife in carrying on the business of the wife's father, whose administratrix the wife was; and the joinder of the wife is improper. Bolingbroke *v.* Kerr, L. R. 1 Ex. 222.

[3] Allen *v.* McCullough, 2 Heisk. 174.

nature; for upon them marriage operates an executory gift, as it were, the husband's title being imperfect unless he does some act to appropriate them before the wife's death. He may sell, assign, mortgage, or otherwise dispose of his wife's chattels real without her consent or concurrence;[1] excepting always such property as she may hold by way of settlement or otherwise as her separate estate.[2] Chattels real, unappropriated during coverture, vest in the wife absolutely, if she be the survivor. In all these respects they resemble *choses in action*. But if the husband be the survivor, such chattels will belong to him *jure mariti*, and not as representing his wife. And in this respect they resemble *choses in possession*.

As to the wife's chattels real, therefore, husband and wife are in possession during coverture by a kind of joint tenancy, with the right of survivorship each to the other; not, however, like joint tenants in general, but rather under the title of husband and wife; since husband and wife are, in contemplation of law, but one person, and incapable of holding either as joint tenants or tenants in common.[3]

The wife's chattels real may be taken on execution for the debts of the husband while coverture lasts, by which means the title becomes transferred by operation of law to the creditor, and the wife's right, even though she should survive her husband, is gone.[4] They may also be bequeathed by the husband by will executed during marriage, or by other instrument to take effect after his death; with, however, this result; that if the wife dies first the bequest will be effectual, not having been subsequently revoked by the husband; while. if the husband dies first, the wife will take the chattel in her own right, unaffected by any will which he may have made, or by any charge he may have created.[5]

[1] Co. Litt. 46 *c;* 2 Kent Com. 134; Sir Edward Turner's Case, 1 Vern. 7; Whitmarsh *v.* Robertson, 1 Coll. New Cases, 570. As to what are chattels real, see 1 Schoul. Pers. Prop. 29, 45–73.

[2] Tullett *v.* Armstrong, 4 M. & C. 395; Draper's Case, 2 Freem. 29; Bullock *v.* Knight, Ch. Ca. 266.

[3] 2 Kent Com. 135; Co. Litt. 351 *b;* Butler's note 304 to Co. Litt. lib. 3, 351 *a*.

[4] 2 Kent Com. 134; Miller *v.* Williams, 1 P. Wms. 258.

[5] Co. Litt. 351 *a*, 466; Roberts *v.* Polgrean, 1 H. Bl. 535.

It would appear that any assignment of a chattel real by the husband will completely appropriate it, even though made without consideration.[1] And if a single woman has a decree to hold and enjoy lands until a debt due her has been paid, — known at the old law as an estate by *elegit*, — and she afterwards marries, her husband may make a voluntary assignment so as to bind her.[2] The right of appropriating the wife's chattels real is, therefore, to be distinguished from the right of reducing things in action into possession. The husband's interest in his wife's chattels real may be called an interest in his wife's right, with a power of alienation during coverture; and an interest in possession, since such chattels are already in possession, but lying in action.[3] As the husband is entitled to administer in his wife's right when she is executrix or administratrix, he may release or assign terms for years or other chattels real vested in her as such.[4] But if he be entitled to a term of years in his wife's right as executrix or administratrix, and have the reversion in fee in himself, the term will not be merged; for, to constitute a merger, both the term and the freehold should vest in a person in one and the same right.[5]

An exception to the husband's right by survivorship to his wife's chattels real occurs in case of joint tenancy. If a single woman be joint tenant with another, then marries and dies, the other joint tenant takes to the exclusion of her husband surviving her; for the husband's title is the newer and inferior one.[6]

When the husband succeeds to his wife's chattels real upon surviving her, or appropriates it during coverture, he takes it subject to all the equities which would have attached against her. In other words, being not a purchaser for a valuable

[1] Cateret *v.* Paschall, 3 P. Wms. 200. But see note to 1 P. Wms. 380.

[2] Merriweather *v.* Brooker, 5 Litt. 256; Paschall *v.* Thurston, 2 Bro. P. C. 10.

[3] Mitford *v.* Mitford, 9 Ves. 98.

[4] Arnold *v.* Bidwood, Cro. Jac. 318; Thrustout *v.* Coppin, W. Bl. 801.

[5] Co. Litt. 338 *b*; 1 Bright Hus. & Wife, and cases cited.

[6] Co. Litt. 185 *b*. Where, during coverture, a lease for years is granted to the wife, adverse possession, which commences during coverture, may be treated as adverse either to the wife or to the husband. Doe *v.* Wilkins, 5 Nev. & M. 435.

consideration, he can claim no greater interest than she had. Thus, where the wife's chattel interest is subject to the payment of an annuity, the husband must continue to make payment so long as the incumbrance lasts. And though he may not in all cases be bound on her covenant to make new leases, yet, if he does so, the equity of the annuitant will attach upon them successively.[1]

§ 88. **Wife's Chattels Real; Leases, &c.; Subject continued.** — The law enables the husband during coverture to defeat his wife's interest by survivorship by an absolute alienation or disposition of the whole term, either with or without consideration.[2] And the same rule applies to the wife's trust terms as to her legal terms.[3] In order to make it effectual, the right of the party in whose favor the disposition is made must commence in interest during the life of the husband; but it is not necessary that it should commence in possession during that period. Thus the husband, though he cannot bequeath these chattels by will, as against the wife's right by survivorship, may grant an underlease for a term not to commence until after his death, and this act will divest the right of the wife under the original lease so far as the underlease is prejudicial to such right.[4] Nor need his disposition cover the whole chattel, since the disposition necessarily operates *pro tanto*.[5] Nor need it be absolute, since a conditional disposition is good if the condition subsequently takes effect.[6] And the law enables the husband to dispose not only of the wife's interest in possession, but also of her possibility or contingent interest in a term, unless where the contingency is of such a nature that it cannot happen during his life.[7] A distinction is, however,

[1] Moody *v.* Matthews, 7 Ves. 183; Rowe *v.* Chichester, Amb. 719. On the question of contribution by annuitants, see Winslowe *v.* Tighe, 2 Ball & B. 204; Hubbs *v.* Rath, 2 *ib.* 553.

[2] 1 Bright Hus. & Wife, 98; Grute *v.* Locroft, Cro. Eliz. 287; Jackson *v.* McConnell, 19 Wend. 175.

[3] Tudor *v.* Samyne, 2 Vern. 270 (incorrectly reported, according to note, 1 Bright Hus. & Wife, 99); Sir Edward Turner's Case, 1 Ch. Ca. 307; Packer *v.* Windham, Prec. in Ch. 412.

[4] Grute *v.* Locroft, Cro. Eliz. 287; Bell Hus. & Wife, 104, 105.

[5] Sym's Case, Cro. Eliz. 33; Lofteris's Case, *ib.* 276; Riley *v.* Riley, 4 C. E. Green, 229.

[6] Co. Litt. 46 *b*. But see 4 Vin. Abr. 50, pl. 14.

[7] Doe d. Shaw *v.* Steward, 1 Ad. & El. 300; 1 Bright Hus. & Wife, 100.

made between cases where the disposition is intended of the whole or of part of the property, and where it is intended as a collateral grant of something out of it. In the latter case the transaction will not bind the wife ; for if she survive her husband, her right being paramount, and her interest in the chattel not having been displaced, she will be entitled to it absolutely free from such incumbrance.[1]

The husband may by other acts than express alienation divest his wife's title, and defeat her rights by survivorship in her chattels real. Thus, if the husband, holding a term in right of his wife, grant a lease of the lands covered by the term, for the lives of himself and his wife, the wife's term will thereby merge, and her right in it be defeated.[2] Or if, while in possession, under a lease to himself and the wife, the husband should accept from the lessor a feoffment of the lands leased, the term would be extinguished and the wife's right along with it, for the livery would amount to a surrender of the term.[3]

On the other hand, there are acts by the husband, which, although they amount to the exercise of an act of ownership, yet, as they do not pass the title, will not defeat the wife's right by survivorship. An instance of the latter is that of the husband's mortgage of his wife's chattels real ; or, what is the same thing in equity, a covenant to mortgage. This is in reality a disposition as security, and until breach of condition the mortgagee has no further title. But, in order to protect the mortgagee's rights, equity treats the mortgage or covenant as good against the wife to the extent of the money borrowed ; that once paid, the chattels will continue hers.[4] After breach of condition, the mortgagee's estate becomes absolute ; or, at least, he can make it so by foreclosure ; and the alienation of the term being then completed at law, the wife's legal right by survivorship is defeated ; subject, how-

And see Donne *v.* Hart, 2 Russ. & My. 360.

[1] Co. Litt. 184 *b;* 1 Bright Hus. & Wife, 103.

[2] 2 Roll. Abr. 495, pl. 50.

[3] Downing *v.* Seymour, Cro. Eliz. 912. And see Lawes *v.* Lumpkin, 18 Md. 334.

[4] Bates *v.* Dandy, 2 Atk. 207 ; Bell Hus. & Wife, 107 ; 1 Bright Hus. & Wife, 106.

ever, to the equity of redemption, where the husband has not otherwise disposed of that likewise.[1] So, too, transactions, not constituting mortgages in the ordinary sense of the term, may yet be so construed in equity where such was their substantial purport. And while the intention of the husband to work a more complete appropriation will be justly regarded by the court, the mere circumstance of a proviso in the conveyance for redemption, pointing to a mode of reconveyance not in conformity with the original title, will not, it seems, debar the wife from asserting her rights by survivorship.[2]

§ 89. **Wife's Real Estate; Husband's Interest.** — Now, as to the effect of coverture on the wife's real estate. By marriage, the husband becomes entitled to the usufruct of all real estate owned by the wife at the time of her marriage, and of all such as may come to her during coverture. He is entitled to the rents and profits during coverture. His estate is therefore a freehold. But it will depend upon the birth of a child alive during coverture, whether his estate shall last for a longer term than the joint lives of himself and

[1] See Pitt *v.* Pitt, T. & R. 180; 1 Prest. on Estates, 345.

[2] Clark *v.* Burgh, 9 Jur. 679. And see *In re* Betton's Trust Estates, L. R. 12 Eq. 553; Pigott *v.* Pigott, L. R. 4 Eq. 549. As to the wife's equity for a settlement, however, it is held that where a husband mortgages the legal interest in a term of years belonging to him in right of his wife, no such equity arises on a claim to foreclose this mortgage against the husband and wife as defendants. Hill *v.* Edmonds, 15 E. L. & Eq. 280.

Among the miscellaneous acts of the husband, which will defeat the wife's survivorship to her chattels real, are the following: A disseverance of his wife's joint tenancy during coverture. Co. Litt. 185 *b;* Plow. Com. 418. An award of the term to the husband, if carried into effect. Oglander *v.* Baston, 1 Vern. 396; note of Jacob to 1 Roper Hus. & Wife, 185, and cases commented upon. The husband's criminal acts; such as attainder. Co. Inst. 351 *a;* 4 Bl. Com. 387; Steed *v.* Cragh, 9 Mod. 43. So, too, his alienage. 2 Bl. Com. 421; 4 Bl. Com. 387. See *post* § 89. Lord Coke considered that ejectment recovered by the husband in his own name would work appropriation; but he was probably in error. See Jacob's note to 1 Roper Hus. & Wife, 185; Co. Litt. 46 *b;* 4 Vin. Abr. 50, pl. 18. Waste operates as a forfeiture of a term. Co. Litt. 351. And finally, the husband's creditors may sell the wife's chattels real on execution, and by their own act determine her interest altogether. Miles *v.* Williams, 1 P. Wms. 258; Co. Litt. 351. But it is held that the wife's survivorship is not defeated by such acts of her husband as erecting buildings on the leasehold premises; and making a mortgage, sale, or lease of part bars the wife only so far. Riley *v.* Riley, 4 C. E. Green, 229.

wife, or not; that is to say, whether he acquires the right of curtesy initiate, to be consummated on the death of the wife leaving him surviving.[1] In the event of such birth, his interest lasts for his own life, whether his wife dies before him or not. If there be no child born alive, his interest lasts only so long as his wife lives. In either case, he has not an absolute interest, but only an estate for life, and his right is that of beneficial enjoyment. When his estate has expired, the real estate vests absolutely in the wife or her heirs, and the husband's relatives have no further concern with it.[2]

While, therefore, the husband has the beneficial enjoyment of his wife's freehold property during coverture, at the common law, the ownership remains in the wife. Herein, her right becomes suspended, not extinguished, by her marriage. The inheritance is in her and her heirs.

Consequently, the husband may collect and dispose of the rents. He may also sue in his own name for injury to the profits of his wife's real estate; as where growing crops are destroyed or carried off; for this relates to his usufructuary interest. But for injuries to the inheritance, such as trespass, by cutting trees, burning fences, and pulling down houses, and generally in actions for waste, the wife must be joined; and if the husband dies before recovering damages, the right of action survives to the wife. And if the wife survives her husband, she may commence such suits without joining his personal representatives.[3] But the husband cannot prosecute such an action alone after his wife's death during the pendency of the suit.[4] Husband and wife are properly joined as plaintiffs in a bill to protect and secure the permanent rights and interests to her real estate.[5]

[1] See *post*, Dissolution by Death, as to Curtesy.

[2] Co. Litt. 351 *a*; 2 Kent Com. 130; 1 Bac. Abr. 286; Junction Railroad Co. *v.* Harris, 9 Ind. 184; Clarke's Appeal, 79 Penn. St. 376; Rogers *v.* Brooks, 30 Ark. 612. The husband's rights and liabilities attach to property bought by himself and held in his name as trustee for his wife. Pharis *v.* Leachman, 20 Ala. 662. But not, as will be seen hereafter, to his wife's separate real estate.

[3] 2 Kent Com. 131; Weller *v.* Baker, 2 Wils. 423, 424; Beaver *v.* Lane, 2 Mod. 217; Bac. Abr. tit. Baron & Feme, K.; 1 Chit. Pl. (6th Am. ed.) 85; 1 Bl. Com. 362; Illinois, &c. R. R. Co. *v.* Grable, 46 Ill. 445; Thacher *v.* Phinney, 7 Allen, 146.

[4] Buck *v.* Goodrich, 33 Conn. 37.

[5] Wyatt *v.* Simpson, 8 W. Va. 394.

Besides the rents and profits during coverture, the husband, if the survivor, is entitled to all arrears accrued up to the time of his wife's death. Such property is not treated like the wife's *choses in action*, not reduced to possession. Accordingly he may maintain suit after coverture to recover all rents and profits which had accrued while coverture lasted. And where the wife joins her husband in a lease, the covenant for payment of rent is for the husband's benefit alone while the usufruct continues.[1] But it would appear to be otherwise where rent is reserved to husband and wife, and her heirs and assigns.[2] In all cases, emblements or growing crops go to the husband or his representatives at the termination of his estate.[3] This rule was extended at the common law to cases of divorce *causa precontractus*.[4] But it does not apply to divorce for the husband's misconduct under modern statutes.[5] The husband's lease in right of his wife operates so far in the tenant's favor as to entitle the latter to emblements.[6] The rule is the same whether the husband be tenant by curtesy or not. No action, therefore, can be maintained by the wife in such cases. Where, pending an action of ejectment brought by husband and wife to recover possession of land to which they were entitled in right of the wife, the husband dies, the right to the rent current and in arrear, and also to damages for waste, survives to the wife; and as to rents accruing after the wife dies also, these go to her heirs and devisees.[7]

The husband's interest in his wife's real estate is liable for his debts, and may be taken on execution against him. But

It is held that the husband can sue intruders alone for digging up the soil and carrying it away. Tallmadge *v.* Grannis, 20 Conn. 296. Or generally for forcibly entering the premises. Alexander *v.* Hard, 64 N. Y. 228.

[1] 1 Washb. Real Prop. 44; Co. Litt. 351 *b*; Jones *v.* Patterson, 11 Barb. 572; Matthews *v.* Copeland, 79 N. C. 493.

[2] Hill *v.* Saunders, 4 B. & C. 529. The wife need not be joined in such suits for rent. Clapp *v.* Stoughton, 10 Pick. 463; Beaver *v.* Lane, 2 Mod. 217; Shaw *v.* Partridge, 17 Vt. 626; Edrington *v.* Harper, 3 J. J. Marsh. 360; Bailey *v.* Duncan, 4 Monr. 260.

[3] Reeve Dom. Rel. 28, and cases cited; Weems *v.* Bryan, 21 Ala. 302; Spencer *v.* Lewis, 1 Houst. 223.

[4] Orland's Case, 5 Coke, 116 *a*.

[5] See Vincent *v.* Parker, 7 Paige, 65, per Chancellor Walworth; Jenney *v.* Gray, 5 Ohio St. 45.

[6] Rowney's Case, 2 Vern. 322; Gould *v.* Webster, 1 Vt. 409.

[7] King *v.* Little, 77 N. C. 138.

nothing more than the husband's usufruct is thereby affected; nor can the attachment or sale affect the wife's ultimate title.[1]

A husband's life estate may be barred by a statute of limitations like other freehold interests.[2] At the common law, attainder of treason or other felony worked a forfeiture or escheat of real estate to the government. And corruption of blood affected the inheritance in such cases. But as regarded the wife's real estate, nothing more could be taken than the husband's life interest: the freehold continued in the wife as before. For the same reason, where the wife was at common law attainted of felony, the lord might enter to the lands by escheat, and eject the husband whenever the crown had had its prerogative forfeiture of a year and a day's waste.[3] The common law of attainder is of no force in this country so far

[1] 2 Kent Com. 131; Babb *v.* Perley 1 Me. 6; Mattocks *v.* Stearns, 9 Vt. 326; Perkins *v.* Cottrell, 15 Barb. 446; Brown *v.* Gale, 5 N. H. 416; Canby *v.* Porter, 12 Ohio, 79; Williams *v.* Morgan, 1 Litt. 168; Nichols *v.* O'Neill, 2 Stockt. 88; Montgomery *v.* Tate, 12 Ind. 615; Lucas *v.* Rickerich, 1 Lea, 726; Sale *v.* Saunders, 24 Miss. 24; Cheek *v.* Waldrum, 25 Ala. 152; Schneider *v.* Starke, 20 Mo. 269. But see Jackson *v.* Suffern, 19 Wend. 175. And see Rice *v.* Hoffman, 35 Md. 344, as to the liability extending to the husband's interest as tenant by the curtesy. The rule in Massachusetts is to allow the purchaser to take the rents and profits for a definite period, or the whole life estate, at an appraisal of the value founded on a proper estimate of the probability of human life. But where the whole life estate is of more value than the amount of the execution, the more proper, and perhaps the only mode, is the former. Litchfield *v.* Cadworth, 15 Pick. 23. It has been held that the husband, under a *bona fide* deed of separation, without trustees, executed before judgment, may relinquish to his wife all interest in her lands, and thus avoid the demands of his creditors upon the property, even though an annuity be reserved to himself. Bonslaugh *v.* Bonslaugh, 17 S. & R. 361. But see Bowyer's Appeal, 21 Penn. St. 210. And it is certain that the sheriff's deed cannot convey a greater interest than the defendant has at the time of attachment or of levy and sale. Williams *v.* Amory, 14 Mass. 20; Johnson *v.* Payne, 1 Hill, 111; Rabb *v.* Aiken, 2 McC. Ch. 119. Therefore, where a statute allows the husband a distributive share in his wife's lands in the event of his survivorship, no such interest passes to the purchaser of lands sold on execution for his debts during her life. Starke *v.* Harrison, 5 Rich. 7. Since the husband's life interest is liable for his own debts, it is liable for the debts of the wife *dum sola*. Moore *v.* Richardson, 37 Me. 438. And it is held in Pennsylvania that where a husband has conveyed his life estate in fraud of his creditors, they may levy upon the growing crops. Stehman *v.* Huber, 21 Penn. St. 260.

[2] Kibbie *v.* Williams, 58 Ill. 30.

[3] Bell Hus. & Wife, 149, 150; 2 Bl. Com. 253, 254. As to the wife's right of dower in such cases, see 2 Bl. Com. 253, and notes by Chitty and others.

as forfeiture and corruption of blood is concerned; but it probably applies to the husband's life interest in his wife's lands.[1] Where the husband was an alien he could not acquire an interest in his wife's real estate at the common law.[2] But the disability is now removed in great measure by statute.[3]

At common law, too, the marital rights of the husband do not attach to realty in which the wife has only a remainder or reversion expectant upon the termination of a precedent life estate.[4] Mere contingencies of the wife, which cannot happen before the death of either spouse, cannot be attached, therefore, by creditors of the husband;[5] nor landed expectancies in general while continuing expectant.[6]

§ 90. **Wife's Real Estate; Husband's Right to convey or lease.** — The husband alone has power at common law to bind or alienate the wife's lands during coverture. This right lasts, at any rate, during their joint lives (provided the parties are not in the mean time divorced); and if the husband becomes a tenant by curtesy, it lasts during his whole life. But the husband's power is commensurate with his estate. He cannot incumber the property beyond the period of his life interest, nor prevent his wife, if she survives him, or her heirs after his death, from enjoying the property free from all incumbrances which he may have created.[7] Under the ancient law of tenures the husband could transfer the property so as to vest it in the grantee, subject to the wife's entry by writ *cui in vita;* for his act amounted to a discontinuance. Statute 32 Hen. VIII. c. 28, was remedial in its effect, so far as to give the wife her writ of entry, notwithstanding her husband's conveyance. Copyhold lands followed a different rule, not being considered within the letter or the equity of this

[1] See Const. U. S. Art. III. § 3.

[2] Washb. Real Prop. 48, and cases cited; Bell Hus. & Wife, 151; Co. Litt. 31 *b;* Menvill's Case, 13 Co. 293; 2 Bl. Com. 293; 2 Kent Com. 39–75.

[3] See note to 1 Washb. Real Prop 49, giving statutory changes. And see Bell Hus. & Wife, 151, 241. Stat. 7 & 8 Vict. c. 66, removes disabilities as to dower for the most part.

[4] Baker *v.* Flournoy, 58 Ala. 650.

[5] Hornsby *v.* Lee, 2 Madd. Ch. 16; Allen *v.* Scurry, 1 Yerg. 36; Sale *v.* Saunders, 24 Miss. 24.

[6] Osborne *v.* Edwards, 3 Stockt. 73; Baker *v.* Flournoy, 58 Ala. 650.

[7] 2 Kent Com. 133.

statute. But by the more recent statutes of 3 & 4 Will. IV. c. 27 and c. 74, and 8 & 9 Vict. c. 106, fines and recoveries have been abolished and feoffments deprived of their tortious operation; and it is enacted that no discontinuance or warranty made after the 31st day of December, 1833, shall defeat any right of entry or action for the recovery of land. At the present day there is, therefore, no mode of conveyance in the English law by which the husband can convey more than his own estate in his wife's lands.[1]

These latter statutes are not, *per se*, of force in this country, for they were passed in England after the colonization of America. But the same result has been very generally reached in this country through a different process. In Massachusetts, the statute of 32 Hen. VIII. is still in force as a modification and amendment to the common law.[2] In other States, ejectment or other summary process may be resorted to.[3] The universal doctrine, whatever may be the form of remedy, prevails, that the husband can do no act nor make any default to prejudice his wife's inheritance. And while his own alienation passes his life estate, it can do no more; and the wife, notwithstanding, may enter after his death and hold possession.[4]

So far as the effect of the husband's lease was concerned, the statute 32 Hen. VIII. c. 28, changed the old common law. By this statute, husband and wife are permitted to make a joint lease of the wife's real estate for a term not exceeding three lives or twenty-one years. There were, however, some restrictions placed upon the operation of this statute. Thus, it was further declared that things which lie in grant, such as franchises, should be excepted; though tithes followed the general principle. And the old lease must have been surrendered either in writing or by operation of law within one year from making the new lease.

[1] 1 Bright Hus. & Wife, 162–168, and authorities cited; Bell Hus. & Wife, 195; Robertson *v.* Norris, 11 Q. B. 916.

[2] Bruce *v.* Wood, 1 Met. 542.

[3] Miller *v.* Shackleford, 4 Dana, 264; N. Y. Rev. Stats. 4th ed. vol. 2, p. 303; 2 Kent Com. 133, *n.*

[4] 2 Kent Com. 133, *n.*; 1 Washb. Real Prop. 279; Butterfield *v.* Beall, 3 Ind. 203; Huff *v.* Price, 50 Mo. 228; Jones *v.* Carter, 73 N. C. 148.

Property in possession might be leased under the statute, but not property in reversion. The lease would not exempt the tenant from responsibility for waste. And the rent reserved should not be less than the average rent of the preceding twenty years. This statute has been strictly construed both in the common-law and equity courts of England.[1]

But the husband's lease of the wife's lands, whether alone or jointly with her, may be good at the common law, though not made in compliance with the statute. In such case the wife may affirm or disaffirm the lease at the expiration of coverture. And the same right may be exercised by her issue, or by others claiming under her or in privity with her. So, too, where she marries again after her husband's death, her second husband has the privilege of election in her stead. But one who claims by paramount title to the wife, as, for instance, a joint tenant surviving her, cannot exercise this right.[2]

Some acts of the wife, on being released from coverture, will amount to an affirmance of her husband's informal lease. Thus acceptance of rent from the tenant, after her husband's death, will confirm the lease.[3] But parol leases of the wife's real estate are affected by the statute of frauds; and not even acceptance of rent can bind the wife surviving: the lease will be treated as utterly void at the husband's death, and not voidable only.[4] Whether acceptance of rent by the wife after the husband's death would confirm a lease in writing, made by the husband alone, is a question on which the authorities are not agreed.[5] A distinction, however, is sometimes made between leases for life and leases for terms

[1] Bell Hus. & Wife, 179–181; 1 Bright Hus. & Wife, 193–219; Darlington *v.* Pulteny, Cowp. 267.

[2] Bell Hus. & Wife, 175, 177; Jeffrey *v.* Guy, Yelv. 78; Smalman *v.* Agborow, Cro. Jac. 417; Anon., 2 Dyer, 159. See also Toler *v.* Slater, L. R. 3 Q. B. 42, where the lessee was held bound on his covenant to pay rent.

[3] Doe *v.* Weller, 7 T. R. 478.

[4] Bell Hus. & Wife, 178. And see Winstell *v.* Hehl, 6 Bush, 58.

[5] Bell Hus. & Wife, 177, and cases cited; Preamble to Stat. 32 Hen. VIII. c. 28; Cro. Jac. 332; Bac. Abr. Leases. C. 1. See 2 Saund. 180, *n.* 10; Bro. Abr. Acceptance, 1; Vaugh. 40; Goodright *v.* Straphan, 1 Cowp. 201; Hill *v.* Saunders, 2 Bing. 112.

of years, when made by the husband alone. The former, it is said, being freehold estates and commencing by livery of seisin, could only be avoided by entry; while the latter became void absolutely on the husband's death. But according to the better authority both kinds of leases follow the same principle, and are not void but voidable at the husband's death.[1]

§ 91. **Wife's Real Estate; Husband's Mortgage; Waste.** — The husband's mortgage of his wife's real estate is effectual to the same extent as his absolute conveyance; that is to say, it will operate upon his life estate or the joint life estate of himself and his wife, as the case may be, and no further. And his lease of the wife's lands for a term of years, for the purpose of creating an incumbrance in the nature of a mortgage, is treated in equity as a mortgage; and the wife's acceptance of rent after his death cannot make such a lease other than void on the termination of his life estate.[2]

§ 92. **Wife's Real Estate; Husband's Dissent to Purchase, &c.; Conversion.** — The husband may dissent from a purchase, gift, or devise of real estate to his wife during coverture; since otherwise he might be made a life tenant to his own disadvantage. But by such dissent he cannot and ought not to defeat her ultimate title as heir.[3] Nor on principle should he be permitted to dissent to any purchase, gift, or devise to the wife's separate use, by the terms of which his own interest as life tenant is legally excluded. Subject to the husband's dissent and the wife's disagreement after her coverture ends, a conveyance to the wife in fee is always good.[4]

If the real estate of the wife be converted into personalty

[1] Bell Hus. & Wife, 177, 178, and cases cited; *contra*, notes to Kent Com. 133, and authorities referred to, including note of Serjeant Williams to Wotton *v.* Hele, 2 Saund. 180.

[2] Bell Hus. & Wife, 193, 194; Goodright *v.* Straphan, 1 Cowp. 201; Drybutter *v.* Bartholomews, 2 P. Wms. 127. The husband's mortgage, in this country also, passes only his life estate, under the like circumstances. Miller *v.* Shackleford, 3 Dana, 291; Barber *v.* Harris, 15 Wend. 615; Railroad Co. *v.* Harris, 9 Ind. 184; Kay *v.* Whittaker, 44 N. Y. 565. As to the wife's remedy for waste, see Schoul. Hus. & Wife, § 171; 1 Washb. Real Prop. 118–124.

[3] Co. Litt. 3 *a*; 1 Dane Abr. 388; 4 *ib.* 397; 1 Washb. Real Prop. 280.

[4] Co. Litt. 3*a*, 356 *b*; 2 Bl. Com. 292, 293; 2 Kent Com. 150. The wife's privilege of disagreement to purchase extended to her heirs. *Ib.*

during her life by a voluntary act of the parties, the proceeds become personal estate, and the husband may reduce into his own possession or otherwise take the proceeds. This principle is known as conversion.[1] But where conversion takes place by act of law, independently of husband and wife, the rule is not so clear.[2] On the other hand, the rule is announced that where a married woman is entitled to a legacy, and land is given her in lieu thereof, the husband having effected no prior reduction of the legacy, it is to be held as hers and for her sole benefit. A case of this sort was lately decided in Pennsylvania.[3] And it is held that land purchased by a married woman with the proceeds of a legacy which the husband has declined to reduce into possession is not liable for the husband's debts.[4]

§ 93. **Wife's Real Estate; Husband's Agreement to Convey.** — By the old law of England it appears that, if a husband agreed to convey real estate belonging to his wife, he might

[1] Hamlin *v.* Jones, 20 Wis. 536; Watson *v.* Robertson, 4 Bush, 37; Tillman *v.* Tillman, 50 Mo. 40; Sabel *v.* Slingluff, 52 Md. 132; Humphries *v.* Harrison, 30 Ark. 79; Schoul. Hus. & Wife, § 156.

[2] Graham *v.* Dickinson, 3 Barb. Ch. 170. In this case, Flanagan *v.* Flanagan, 1 Bro. C. C. 500, appears to have been disapproved. In New York, however, it is held that where the real estate of a married woman has been converted into personalty by operation of law during her lifetime, it will be disposed of by a court of equity, after her death, in the same manner as if she had herself converted it into personal property previous to her death. Graham *v.* Dickinson, 3 Barb. Ch. 170. So, too, in some States, conversion of real estate, under partition proceedings, into personalty has been held complete where equity decreed partition, and the wife died after a final confirmation of the sale in court, all terms of sale having been complied with, and all formalities duly observed. Jones *v.* Plummer, 20 Md. 416; Cowden *v.* Pitts, 2 Baxt. 59. Where an administrator's sale of the wife's land is irregular, the husband cannot, apart from the wife, confirm it, even though he has received the purchase-money. Kempe *v.* Pintard, 32 Miss. 324. See also Ellsworth *v.* Hinds. 5 Wis. 613; Osborne *v.* Edwards, 3 Stockt. 73. But a husband may demand and reduce into possession his wife's legacy, even though it be made payable, by the terms of a will, from proceeds of the sale of the testator's real estate. Thomas *v.* Wood, 1 Md. Ch. 296. Conversion takes place where husband and wife convey to trustees to sell and dispose for payment of debts, balance to be paid them as they shall direct or appoint. Siter *v.* McClanachan, 2 Gratt. 80. And see *post*, c. 14.

[3] Davis *v.* Davis, 46 Penn. St. 342. But see Davis's Appeal, 60 Penn. St. 118.

[4] Coffin *v.* Morrill, 2 Fost. 352. And see Sims *v.* Spalding, 2 Duv. 121. See further incidents, Schoul. Hus. & Wife, § 172.

be compelled to execute the contract by getting her to levy a fine.[1] This rule no longer holds good in that country.[2] Even where the agreement has been made, not by the husband, but by the wife herself before her marriage, the agreement cannot now be enforced against the wife.[3] But it is nevertheless binding upon the husband; though, where the purchaser has not been misled, the husband cannot be made to convey his partial interest and submit to an abatement of the price, because of the wife's refusal to convey her real estate which he and she had promised to convey.[4]

§ 94. **Wife's Agreement to Convey; Her Conveyance, Mortgage, &c., under Statutes.** — An agreement by a *feme covert* for the sale of her real estate, the same not being her separate property, cannot be enforced at law or in equity against her.[5] And Sugden considers it doubtful whether a married woman, having a power of appointment, can thus bind herself.[6] But modern statutes, which permit the wife to convey with the observance of certain formalities, often permit her generally to contract, to convey, and to incumber her lands.

Under the modern statute of 3 & 4 Will. IV. c. 74, which took effect in England from the end of the year 1833, married women are permitted to alienate or incumber their real estate by conveyances executed with their husbands pursuant to its provisions. This important law, with its later modifications, unfettered property which had long been fast bound.[7] The statute requires the concurrence of the husband in such conveyances; also that the wife shall make an acknowledgment before certain judicial officers designated by the act, apart

[1] 2 Bright Hus. & Wife, 47; Macq. Hus. & Wife, 32.

[2] Frederick *v.* Coxwell, 3 Y. & J. 514; Emery *v.* Ware, 8 Ves. 505; 2 Story Eq. Juris. §§ 49–53; Thayer *v.* Gould, 1 Atk. 617; 1 Amb. 495. But see Davis *v.* Jones, 4 B & P. 267.

[3] Per Lord Ch. Cottenham, Jordan *v.* Jones, 2 Phill. 170; Rowley *v.* Adams, 6 E. L. & Eq. 124.

[4] Tothill, 106; Hall *v.* Hardy, 3 P. Wms. 187; Morris *v.* Stephenson, 7 Ves. 474; Castle *v.* Wilkinson, L. R. 5 Ch. 534.

[5] Macq. Hus. & Wife, 32: Emery *v.* Ware, 5 Ves. 846; Sug. V. & P. 11th ed. 230.

[6] Sug. V. & P. 11th ed. 231. She certainly cannot in some States. Kennedy *v.* Ten Broeck, 11 Bush, 241. But the wife cannot use her privilege in this respect unfairly, where the purchaser has become bound on his part. See Cross *v.* Noble, 67 Penn. St. 74.

[7] See 8 & 9 Vict. c. 106.

from her husband, to the effect that her own consent is freely and voluntarily given.[1]

In this country the custom of a wife's joining her husband in a deed of conveyance of her lands has prevailed from a very early period. In most, if not all, of the States, there are statutes existing as to the mode of execution, which contemplate the joinder of husband and wife in the conveyance, and an acknowledgment by one or both of the parties.[2] Some of the States require a separate acknowledgment of the wife apart from her husband, and even a privy examination by the magistrate, so as to make sure that she is acquainted with the contents of the deed, and acts freely and understandingly; but in this and other respects the laws are not uniform. There is less formality in general than under the English statute. Thus, then, does the wife pass title to her real estate.

And since, in the tenure of lands and the mode of conveyance, the law in this country has always varied considerably from that of England, the rights of married women in other respects may be different.[3] But following the English doc-

[1] See Macq. Hus. & Wife, 28–32; *ib.* Appendix, 1–47, where the provisions of this act, the rules of court made in pursuance, and leading decisions on the construction of different sections are fully given. And see *In re* Dowling, 18 C. B. N. S. 233. We have not thought it worth while to embody them in this work, as they have only a local application. There are many cases constantly arising in the English courts as to the interpretation of this statute, with its amendments; but they seem chiefly confined to the effect of the wife's acknowledgment. Previous to the statute of 3 & 4 Will. IV. c. 74, the wife could convey her interest only by levying a fine, which, as well as suffering recoveries, is abolished by that statute. 1 Washb. Real. Prop. 280; 1 Wms. Real Prop. 88.

[2] 1 Washb. Real Prop. 281, and cases cited; Davey *v.* Turner, 1 Dall. 15; Jackson *v.* Gilchrist, 15 Johns. 109; Page *v.* Page, 6 Cush. 196; 2 Kent Com. 151–155, and notes, showing custom in different States; Albany Fire Ins. Co. *v.* Bay, 4 Comst. 9; Ford *v.* Teal, 7 Bush, 156; Mount *v.* Kesterson, 6 Cold. 452; Tourville *v.* Pierson, 39 Ill. 446; Deery *v.* Cray, 5 Wall. 795; Alabama, &c. Ins. Co. *v.* Boykin, 38 Ala. 510; Lindley *v.* Smith, 46 Ill. 523; Tubbs *v.* Gatewood, 26 Ark. 128. The privy examination of a wife for ascertaining that she executes the deed freely and without undue influence or compulsion of her husband is a feature of the legislation in many States; and the validity of her conveyance often turns upon a compliance with such a requirement. Schoul. Hus. & Wife, § 174.

[3] Thus it would seem that the joint assent of husband and wife in accepting a title should be as good as in granting one. 1 Washb. Real Prop. 280. And in New Hampshire it is held

trine, the wife's executory agreement to convey real estate, whether expressed by bond or simple instrument, is in this country held void in the absence of enabling statutes, like her general contracts, though made with her husband's assent; and specific performance cannot be enforced against her.[1] So it has been held in Vermont that the wife cannot, either separately or jointly with her husband, execute a valid power of attorney to convey her lands.[2] And a deed, in order to bind the wife's heirs, must have been delivered, as well as executed, during her lifetime.[3] Nor can her husband, after her decease, as against such heirs, confirm a conveyance which was fatally irregular on her part.[4] If her conveyance be void, a note given in part-payment of the price is necessarily without consideration.[5] And as she cannot bind herself to convey, neither can she be bound by her agreement to purchase.[6] Nor will the law coerce her into fulfilling her agreement by granting exemplary damages against her husband.[7]

that a deed to a *feme covert*, made with her own and her husband's assent, vests the title legally in her. Gordon *v.* Haywood, 2 N. H. 402. See Leach *v.* Noyes, 45 N. H. 364. In Pennsylvania, if land conveyed to her be incumbered, it passes to her subject to that incumbrance. Cowton *v.* Wickersham, 54 Penn. St. 302. And in Vermont it has been held that a deed of gift to a wife during coverture, if accepted by her husband, is accepted by her, and that her refusal apart from him is of no consequence. Brackett *v.* Wait, 6 Vt. 411.

[1] 2 Kent Com. 168; Butler *v.* Buckingham, 5 Day, 492; Dankel *v.* Hunter, 61 Penn. St. 382; Stidham *v.* Matthews, 29 Ark. 650; Moseby *v.* Partee, 5 Heisk. 26; Holmes *v.* Thorpe, 1 Halst. Ch. 415; Lane *v.* McKeen, 15 Me. 304. We make, of course, no reference here to the wife's *separate property*, or to her rights under what are known as the "married women's acts," to be considered *post*. See Blake *v.* Blake, 7 Iowa, 46. A contract to convey, made by husband and wife, may be good against the husband, though void as to the wife. Steffey *v.* Steffey, 19 Md. 5; Johnston *v.* Jones, 12 B. Monr. 326. 2 Kent Com. 168. See *supra*, § 60. Upon the strict assent of husband and wife, equity has sometimes decreed a sale under the wife's title bond. Moseby *v.* Partee, 5 Heisk. 26. As to the wife's ratification of the husband's unauthorized contract for the sale of her land, see Ladd *v.* Hildebrandt, 27 Wis. 135.

[2] Sumner *v.* Conant, 10 Vt. 1; Gillespie *v.* Worford, 2 Cold. 632; Hardenburgh *v.* Lakin, 47 N. Y. 109.

[3] Thoenberger *v.* Zook, 34 Penn. St. 24. But see Ackert *v.* Pults, 7 Barb. 386; Somers *v.* Pumphrey, 24 Ind. 231.

[4] Dow *v.* Jewell, 1 Fost. 470.

[5] Warner *v.* Crouch, 14 Allen, 163.

[6] Robinson *v.* Robinson, 11 Bush, 174. But though coverture is a good defence to a suit for specific performance, the wife will not be permitted to refuse a deferred payment of purchase-money and at the same time retain the land. Staton *v.* New, 49 Miss. 307.

[7] Burk *v.* Serrill, 80 Penn. St. 413. In some States the separate conveyance of a married woman, or her ex-

So, too, in this country, a married woman may mortgage as well as alienate her real estate by joining her husband in the conveyance and making due acknowledgment; and this, too, though no consideration pass to her thereby.[1] Where the wife joins her husband in a conveyance in the nature of a mortgage, she subjects her real estate to the risk of complete alienation by foreclosure for her husband's debt, or by sale under a power of sale thereby conferred. She is estopped by her own acts from denying the validity of the mortgage.[2] She may covenant that *scire facias* may issue in default of payment.[3] She may create a valid power in the mortgage to sell in default of payment.[4] And in general she may convey upon condition and prescribe the terms.[5] But independently of an express statute permission, and as our statutes generally run, the wife's mortgage without her husband's joinder or assent is void.[6] And so is her assignment of a mortgage.[7]

§ 95. **Covenants in Wife's Statute Conveyance or Mortgage, &c.** — The rights of the wife are nevertheless in all such cases of conveyance, absolutely or for security, treated with great

ecution jointly with her husband, but without observance of the full statute formalities, is void. But in others such irregularities are not held fatal to the instrument, and she is furthermore bound on the usual principles, even though her deed be separate from that of her husband and executed at a different time. The question in such cases is mainly one of statute construction; and as to formalities a distinction may be taken between mere errors of description, or literal informalities of execution or acknowledgment on the one hand, and, on the other, the disregard of some statutory requirement, so as to substantially violate public policy, such, for instance, as her separate acknowledgment, or her declaration before the magistrate that she executed freely and understandingly for the purpose specified. See Schoul. Hus. & Wife, §§ 175, 176, where this subject of statute conveyances by husband and wife is considered at length.

[1] Eaton *v.* Nason, 47 Me. 132; Swan *v.* Wiswall, 15 Pick. 126; Whiting *v.* Stevens, 4 Conn. 44; Demarest *v.* Wynkoop, 3 Johns. Ch. 144; 2 Kent Com. 167; Siter *v.* McClanachan, 2 Gratt. 280; Schoul. Hus. & Wife, § 176; American, &c. Ins. Co. *v.* Owen, 15 Gray, 491.

[2] McCullough *v.* Wilson, 21 Penn. St. 436.

[3] Black *v.* Galway. 24 Penn. St. 18.

[4] 2 Kent Com. 167; Vartie *v.* Underwood, 18 Barb. 561; Barnes *v.* Ehrman, 74 Ill. 402.

[5] Demarest *v.* Wynkoop, 3 Johns. Ch. 129; 2 Kent Com. 167. So, too, in England. Pybus *v.* Smith, 1 Ves. Jr. 189.

[6] Weed Sewing Machine Co. *v.* Emerson, 115 Mass. 554; Bressler *v.* Kent, 61 Ill. 426; Yager *v.* Merkle, 26 Minn. 429; Herdmann *v.* Pace, 85 Ill. 345.

[7] Moore *v.* Cornell, 68 Penn. St. 320.

consideration in our courts.[1] Wherever the wife joins her husband in a mortgage of her own property to secure his debts or the payment of money loaned to him, she is merely the surety of her husband, and is entitled to all the rights and privileges of a surety. This rule is well settled.[2] The property actually mortgaged by her, and not her property in general, is thus subjected to the payment of her husband's note; and she cannot be held personally liable for any deficiency under the foreclosure sale.[3]

So, too, a wife is not bound by her warranty in a deed which she executes. Nor by any covenants contained therein. This is the general common-law rule in England and America.[4] For this accords with the principle that married women are incapable of binding themselves by contract; and the effect of her conveyance under the statute is simply that she passes whatever title she had in the lands conveyed. Yet the husband may be bound on his part, where he joins her, notwithstanding.[5] In England, where the wife formerly passed her real estate by suffering a fine, it was held long ago that if the grantee were evicted by a paramount title, the wife could be sued on her covenant of warranty after her husband's death.[6] So, too, it was formerly said that the wife should be held bound on the covenants contained in a lease of her lands executed during coverture, with her husband, and affirmed by herself after his death, by such acts as the acceptance of rent;[7] and this doctrine is certainly not unreasonable so far as a subsequent breach of covenant is concerned. But further than this, courts would not probably go

[1] See Bayler *v.* Commonwealth, 40 Penn. St. 37, per Strong, J.; *ib.* p. 44.

[2] Neimcewicz *v.* Gahn, 3 Paige, 614; Hawley *v.* Bradford, 9 Paige, 200; Vartie *v.* Underwood, 18 Barb. 561. See Schoul. Hus. & Wife, § 177, more fully.

[3] Strother *v.* Law, 54 Ill. 413; Logan *v.* Thrift, 20 Ohio St. 62; Schoul. Hus. & Wife, § 177, and cases cited.

[4] 2 Kent Com. 167, 168; Fowler *v.* Shearer, 7 Mass. 21, per Parsons, C. J.; Falmouth Bridge Co. *v.* Tibbetts, 16 B. Monr. 637; Den *v.* Demarest, 1 Zab. (N. J.) 525; Rawle Cov. 573, 574; Botsford *v.* Wilson, 75 Ill. 133.

[5] Buell *v.* Shuman, 28 Ind. 464; Griner *v.* Butler, 61 Ind. 362.

[6] Wotton *v.* Hele, 2 Saund. 177; 1 Mod. 290. Chancellor Kent justly observes that this was a very strong case to show that she might deal with her land by fine as a *feme sole.* 2 Kent Com. 167.

[7] 2 Saund. 80, note 9.

at this day.[1] And in this country the wife's covenants in a conveyance executed jointly with her husband are considered binding upon her only by way of estoppel; and not so as to subject her to suit for damages.[2] And as she is not answerable for a breach of covenant, neither are her heirs or devisees.[3] Indeed, in New York, the wife's privilege in this respect is carried much further, for she is permitted to execute a conveyance of land with her husband, containing a covenant of warranty on her part, and then to defeat the title by acquiring an adverse interest afterwards.[4]

§ 96. **Conveyance, &c., of Infant Wife's Lands.** — A deed of the wife's real estate, executed by husband and wife while the latter is under age, may be avoided by the wife within reasonable time after discoverture, though more than twenty years have elapsed;[5] for this is analogous to the conveyance of an infant *feme sole* in respect of validity.[6] But not, as it is held, where the wife, being apparently of full age, made oath that she was of age.[7] As to the lapse of time permitted a wife for disaffirming the deed executed by her during infancy, the rule appears to be that a reasonable time should be allowed her after coverture has terminated by the death of her husband or their complete divorce, even though twenty or thirty years may meantime have elapsed since her attainment to majority.[8]

[1] Her covenant for quiet enjoyment in the lease of her lands will not bind her. Foster *v.* Wilcox, 10 R. I. 443.

[2] Nash *v.* Spofford, 10 Met. 192; Jackson *v.* Vanderheyden, 17 Johns. 167; Dean *v.* Shelly, 57 Penn. St. 426; Hyde *v.* Warren, 46 Miss. 13.

Her subsequent promise as widow to be answerable for a breach of covenant committed during her coverture is without consideration. State Nat. Bank *v.* Robidoux, 57 Mo. 446.

[3] Foster *v.* Wilcox, 10 R. I. 443.

[4] Jackson *v.* Vanderheyden, 17 Johns. 167; Carpenter *v.* Schermerhorn, 2 Barb. Ch. 314. And see Shumaker *v.* Johnson, 35 Ind. 33. *Contra*, Colcord *v.* Swan, 7 Mass. 291; Hill *v.* West, 8 Ohio, 225; Massie *v.* Sebastian, 4 Bibb, 436; Nash *v.* Spofford, 10 Met. 192. And see 4 Com. Dig. 79 *b*.

[5] Yourse *v.* Norcross, 12 Mo. 549. And see Porch *v.* Fries, 3 C. E. Green, 204; Dodd *v.* Benthal, 4 Heisk. 601; Williams *v.* Baker, 71 Penn. St. 476.

[6] Dixon *v.* Merrett, 21 Minn. 196.

[7] Schmitheimer *v.* Eiseman, 7 Bush, 298. *Sed qu.*, where the land belongs to the wife's general, and not her separate, estate. Sims *v.* Everhardt, 102. U. S. Supr. 300, commenting upon Scranton *v.* Stewart, 52 Ind. 68.

[8] Sims *v.* Everhardt, 102 U. S. Supr. 300. And see Harrer *v.* Wallner, 80 Ill. 197.

§ 97. **Distinction between Wife's General and Separate Real Estate.** — We may observe, on the whole, that, while modern statutes greatly vary in this country, as to the requisites attending a married woman's conveyance of her lands, and, as we shall notice hereafter, concerning her legal dominion over her lands, the disposition is to construe those requisites more strictly in the case of her general or common-law real estate than where she owns lands as her statutory separate estate. Hence a distinction, which modern legislation tends all the while to obliterate, between the conveyance of the wife's general land and of her separate land. As to the latter, estoppel *in pais* is sometimes applicable; but not so, usually, with the former. In the one case the wife's own conduct during coverture, by way of affirmance or receiving benefits, may bind her in spite of some defective method of conveyance: in the other and present case it does not.[1]

§ 98. **Wife's Life Estate; Joint Tenancy, &c.** — If the wife at the time of her marriage has a life estate in lands, her husband becomes seised of such estate in the right of his wife, and he is entitled to the profits during coverture. So if it were granted to a trustee for her own use. And the same rule applies whether the estate be for the life of the wife or of some other person. If the estate be for the wife's own life it terminates at her death, and the husband has no further interest in it. But if it be an estate for the life of another person who survives her, the husband takes the profits during the remainder of such person's life as a special occupant of the land. The husband's representatives in either case take crops growing on the land at the time of his death.[2] But the husband might, at common law, take a release or confirmation to enlarge his life estate.[3] The conveyance of the wife's life estate follows the usual statute rule as to her conveyances.[4]

[1] See cs. 10, 11, *post*; also Wood *v.* Terry, 30 Ark. 385; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Sims *v.* Everhardt, 102 U. S. Supr. 300, opinion of court.

[2] 2 Kent Com. 134; 1 Bright Hus. & Wife, 112, 113.

[3] Co. Litt. 299.

[4] Henning *v.* Harrison, 13 Bush, 723. As concerns the wife's life estate in her

A husband acquires, by his marriage, the right to use and occupy, during coverture, lands held by his wife in joint tenancy.[1]

§ 99. **Husband's Freehold Interest in Wife's Land not Devisable by Wife.** — The freehold which the husband acquires in his own right in the real estate of his wife during her coverture is a subject upon which the wife's devise cannot operate, more than her conveyance, independently of his permission.[2]

CHAPTER VII.

COVERTURE MODIFIED BY EQUITY AND RECENT STATUTES.

§ 100. **Prevalent Tendency to Equalize the Sexes; Marriage Relation affected.** — Aside from woman's political relations, and those social and business opportunities not peculiar to the marriage state, which are now extended to her sex, we may observe, both in England and the United States, a liberal disposition of court and legislature within the present century to bring her nearer to the plane of manhood, and advance her condition from obedient wife to something like co-equal marriage partner. Man makes the concessions, step by step, out of deference to woman's wishes, and in token of her influence; and thus does the coverture theory of marriage gradually fade out of our jurisprudence. The liberal tendencies of modern civilization favor this change: moreover, that love of justice and individual liberty which always characterized our Saxon race, and the steadfast disposition of English and American courts both to administer the written law impartially, and to extend and adapt its provisions to the ever-changing wants of society.

real or personal property, the English chancery courts have followed out exceptions to the doctrines of equitable assignment already noticed, with their limitations. See Purdew *v.* Jackson, 1 Russ. 1; Schoul. Hus. & Wife, § 157; *supra*, § 84.

[1] Bishop *v.* Blair, 36 Ala. 80; Royston *v.* Royston, 21 Ga. 161.

[2] Clarke's Appeal, 79 Penn. St. 376. See *post*, as to the wills of married women.

Our preceding pages have shown, in respect to the person of the spouses, their matrimonial domicile, the conjugal restraint and correction of the wife, the custody of the offspring; again, as to the wife's power to bind as agent, her necessaries, or, in respect of property, her equity to a settlement, and modern modes of conveying her lands; a modern disposition to so construe and apply or modify the old law that she may enjoy a very fair share of freedom and consideration in the household, and maintain her dignity under all circumstances. Husband and wife cease to be one; they are two distinct persons with distinct and independent rights. At the same time the idea of unity in the domestic government — of domestic government at all — becomes weakened; the cruel or dissolute husband having less power for ill, and the just and faithful one, too, finding his legal authority over a high-tempered companion exceedingly precarious. Modern legislation accomplishes even more than judicial construction towards this result, especially in the United States; and indeed, as to the married women's acts and divorce acts of this day, it may be truly said that England borrows more from this country than does this country from England.

Of the American married women's acts, which relate chiefly to their property and contracts, we have already spoken.[1] These acts are modern; still, they are constantly undergoing local change, and immense labor has been necessarily bestowed by local courts during the last fifteen years in expounding them. We shall seek to place before the reader such legal results as may be thought to have passed into principles; as for the rest, it is a chaos of uninteresting rubbish, from which the practitioner selects only that which obtains in his own jurisdiction. All this legislation regarding the rights of married women should be harmonized and simplified as soon as practicable. This is not easy with so many independent States, each carving out its own career. And the difficulty is aggravated from the fact that the married women's acts had no common origin; there was no

[1] See Part I., *supra*.

model found to work from, English or American, and the results were necessarily discordant.

§ 101. **Modern Changes in Married Women's Rights; How to be Studied.** — The changes to which we shall proceed to direct the reader's inquiry, under our main heading, must be studied as by way of supplement or supersedure to the coverture doctrine set forth in the chapters preceding. As before, these changes affect the wife's debts and contracts, her injuries and frauds, and her personal and real property. They are partly of equitable and partly of statutory origin. But, most of all, they impair the old doctrine which treated the husband as absolute or temporary owner, controller, and manager of his wife's property and acquisitions, by virtue of the marriage, and create in favor of the wife what is commonly known in these days as her separate property.

Here, therefore, as on most points relating to the law of husband and wife, one must first examine the old common-law or coverture doctrine, and then perceive how far modern equity rules or the local legislation may have varied that law. Such changes date back not much farther than a century, the most radical of them being less than half a century old; the equitable changes being for the most part of earlier, and the statutory changes of later, date, and the law of England and this country harmonizing on the whole subject, at the independence of the American colonies, as at their first settlement. The instance will be found rare at the present day, where an important common-law principle respecting the wife's contracts, torts, property, and the formalities of suit is not at this day essentially changed.

§ 102. **Modern Equity and Statute Doctrine; England and the United States.** — As preliminary to an exposition of the wife's separate property, we may observe that there is an equitable doctrine on this subject and a statutory doctrine. The equitable doctrine is the prior in point of time, and is chiefly the work of English chancery courts; while the statutory doctrine, which is of later date, is founded in the married women's acts, now familiar in our several States, and their judicial construction. The equitable doctrine is more purely

English; the statutory doctrine more purely American, — though each country has come, ere this day, to borrow in this respect from the other. American cases frequently distinguish still between an equitable separate estate and a statutory separate estate in favor of a wife; but so sweeping is the latest legislation in most States that such a distinction becomes of comparatively little consequence.

CHAPTER VIII.

THE WIFE'S SEPARATE PROPERTY; ENGLISH DOCTRINE.

§ 103. **Origin and Nature of Separate Estate in Chancery.** — In the present chapter, and with reference to Great Britain, our concern is almost exclusively with the remarkable development of an equitable doctrine of separate property. Emerging from coverture and the common law, we come out into the light of equity; and here all things assume a new aspect. The married woman is no longer buried under legal fictions. She ceases to hold the strange position of a being without an existence, one whose identity is suspended or sunk in the *status* of her husband; she becomes a distinct person, with her own property rights and liabilities. Her condition is not as independent as before marriage; this the very idea of the marriage relation and the disabilities of her sex forbid. But she is dependent only so far as the laws of nature and the forms of society make her so; while her comparative feebleness renders her the special object of chancery protection, whenever the interests of herself and her husband clash together. She may contract on her own behalf; she may sue and be sued in her own name; she may hold lands, goods, and chattels in her own right, which property is known as the wife's separate estate, or estate limited to the wife's separate use.

The doctrine of the wife's separate estate originated in the spreading conviction that it was expedient for the interests of

society that means should exist by which, upon marriage, either the parties themselves by contract, or those who intended to give bounty to a family, might secure property without that property being subject to the control of the husband.[1] In England that doctrine was established more than a century ago, and to the equity courts belong the credit of the invention.[2] The equity to a settlement, of which we have already spoken, is part of that doctrine.[3] While at common law the separate existence of the wife was neither known nor contemplated, equity considered that a married woman was capable of possessing property to her own use, independently of her husband; and the courts gradually widened and developed this principle until it became fully settled that, however the wife's property might be acquired, whether through contract with her husband before marriage, or by gift from him or from any stranger independently of such contract, equity would protect it, if duly set apart as her separate estate, no matter though the husband himself must be held as the trustee to support it.[4]

This great change in the jurisprudence of England was effected by a few great men without any help from the legislature. The court of chancery in this as in other respects recognized its true function of making the law work justice by accommodating its operation to the altered circumstances of society.[5] Obscure and doubtful indications of the wife's separate estate are found as early as the reign of Queen Elizabeth. It seems to have been plainly recognized by Lord Nottingham, Lord Somers, and Lord Cowper. In Lord Hardwicke's time it was perfectly established; and Lord Thurlow, in sanctioning the clause against anticipation, prevented the wife herself from destroying the fabric which had been reared for her benefit.[6]

[1] Rennie *v.* Ritchie, 12 Cl. & Fin. 234; Peachey Mar. Settl. 259.

[2] Harvey *v.* Harvey, 1 P. Wms. 124; Woodmeston *v.* Walker, 2 R. & M. 205; Tullett *v.* Armstrong, 1 Beav. 21.

[3] *Supra*, § 85; Schoul. Hus. & Wife, §§ 160–162.

[4] Tullett *v.* Armstrong, 1 Beav. 21; Peachey Mar. Settl. 260, and cases cited.

[5] Macq. Hus. & Wife, 284.

[6] See Pybus *v.* Smith, 4 Bro. C. C. 485; Tullett *v.* Armstrong, per Lord Langdale, 1 Beav. 22; Macq. Hus. & Wife, 285.

§ 104. **Whether Appointment of a Trustee is Necessary.** — Where property comes to the wife's separate use, it is treated in equity as trust estate, of which she is *cestui que trust.* Yet it is not actually necessary that the instrument constituting the separate use should itself make an appointment of trustees. Formerly the rule was otherwise ; but at the present day equity makes the husband a trustee where no other holds possession, and thus supports the trust.[1] And where a trustee, regularly appointed, in breach of his duty, and without the privity of the wife, pays the trust-money over to the husband, equity follows the money into the husband's hands, and makes him likewise accountable as his wife's trustee.[2] It impresses a trust upon the wife's separate estate wherever such estate may be found. But while the appointment of third persons as trustees is not essential to give the wife a separate estate, or a separate interest in any particular estate, it is certainly desirable on many accounts, and there is in it this marked advantage, that the property is made thereby more secure, because such influence of the husband over the wife is prevented as might induce her to abandon the property to him.[3]

§ 105. **Coverture applies Prima Facie ; How Separate Estate is created.** — *Prima facie* the legal ownership of property which is in the wife at the time of marriage, or comes to her during coverture, vests in the husband under his marital right. It is therefore necessary that the intention to establish a separate use be clearly manifested, else courts of equity will not interpose against him. No technical formalities or expressions are required ; but the purpose must appear beyond the reach of reasonable controversy, in order to entitle the wife to claim the property as her own in derogation of the common law.[4]

[1] Bennett *v.* Davis, 2 P. Wms. 316 ; Davison *v.* Atkinson, 5 T. R. 435 ; Messenger *v.* Clarke, 5 Exch. 393 ; Peachey Mar. Settl. 260 ; Fox *v.* Hawks, L. R. 13 Ch. D. 822.

[2] Rich *v.* Cockell, 9 Ves. 375. See also Izod *v.* Lamb, 1 Cr. & J. 35.

[3] Newlands *v.* Paynter, 10 Sim. 377 ; s. c. on appeal, 4 M. & Cr. 408 ; Humphery *v.* Richards, 25 L. J. Eq. 444 ; s. c. 2 Jur. 433 ; Peachey Mar. Settl. 260 ; Macq. Hus. & Wife, 291. Equity can sanction, on behalf of a married woman, the compromise of a suit to make a trustee liable for breach of trust in the fund. Wall *v.* Rogers, L. R. 9 Eq. 58.

[4] Macq. Hus. & Wife, 307 ; Tyler *v.*

As a wife is only made a party to a suit instituted by

Lake, 2 Russ. & M. 183; Kensington *v.* Dollond, 2 M. & K. 184; Moore *v.* Morris, 4 Drew. 37; Peachey Mar. Settl. 279. As to the words which in themselves indicate the intention of creating a separate use, there have been numerous decisions. Among them the following expressions are held sufficient: "For her full and sole use and benefit." Arthur *v.* Arthur, 11 Ir. Eq. 511. "For her own sole use and benefit." *Ex parte* Killick, 3 Mon. D. & De G. 480. "For her sole use." Lindsell *v.* Thacker, 12 Sim. 178. "For her sole and separate use and benefit." Archer *v.* Rorke, 7 Ir. Eq. 478. "For her sole and separate use." Parker *v.* Brooke, 9 Ves. 583; Adamson *v.* Armitage, 19 Ves. 415. "For her sole use and benefit." —— *v.* Lyne, Younge, 562. "For her own sole use, benefit, and disposition." *Ex parte* Ray, 1 Madd. 199. "For her sole and absolute use." Davis *v.* Prout, 7 Beav. 288. "For her own use, and at her own disposal." Prichard *v.* Ames, Turn. & Russ. 222. "To be at her disposal, and to do therewith as she shall think fit." Kirk *v.* Paulin, 9 Vin. Abr. 96, pl. 43. "Solely and entirely for her own use and benefit." Inglefield *v.* Coghlan, 2 Coll. 247. "For her own use, independent of any husband." Wagstaff *v.* Smith, 9 Ves. 520. "Not subjected to the control of her husband." Bain *v.* Lescher, 11 Sim. 397. "For her own use and benefit, independent of any other person." Margetts *v.* Barringer, 7 Sim. 482. "For her livelihood." Darley *v.* Darley, 3 Atk. 399. And see Peachey Mar. Settl. 279, 280; Macq. Hus. & Wife, 308, 309. "As her separate estate." Fox *v.* Hawks, L. R. 13 Ch. D. 822. "To receive the rents while she lives, whether married or single." Goulder *v.* Camm, De G. F. & J. 146.

So, too, the intention of excluding the husband's marital rights may be inferred from the nature of the provisions attached to the gift; as where, for example, the direction is that the property shall be at the wife's disposal, or there is some other clear indication that such was the donor's intention. Prichard *v.* Ames, Turn. & Russ. 223; Peachey Mar. Settl. 279. Lord Thurlow once decided that a direction "that the interest and profits be paid to her, and the principal to her or to her order by note, or writing under her hand," created a trust for the wife's separate use. Hulme *v.* Tenant, 1 Bro. C. C. 16. So in the judgment of Sir William Fortescue, Master of the Rolls, did the words "that she should enjoy and receive the issues and profits of the estate." Tyrrell *v.* Hope, 2 Atk. 561. "For to what end should she receive it," says this judge, "if it is the property of the husband the next moment?" And Lord Loughborough gave a like effect to a direction that certain property should be delivered up to a married woman "whenever she should demand or require the same." Dixon *v.* Olmius, 2 Cox, 414. A similar construction has also been applied to the words, "to be laid out in what she (the wife) shall think fit." Atcherley *v.* Vernon, 10 Mod. 518. See Blacklow *v.* Laws, 2 Hare, 52. And a legacy to a married woman, "her receipt to be a sufficient discharge to the executors," has been held sufficient. Warwick *v.* Hawkins, 13 E. L. & Eq. 174. A legacy added by a codicil to the legacy given by a will is subject to the incidents of the original legacy; and the separate use may be extended by construction from the will to the codicil. Day *v.* Croft, 4 Beav. 561.

Yet, on the other hand, the form of expression will go far towards determining whether property is or is not limited to the wife's separate use. Vice-Chancellor Wigram, in a case before him not many years ago, was forced to admit that while ruling out certain property from the wife's separate use, on account of the testator's insufficient language, he had a strong opinion that he decided against the

her husband on the alleged ground of her having sepa-

real intention of the testator. Blacklow *v.* Laws, 2 Hare, 49. It is to be observed, then, that courts of equity will not deprive the husband of his rights at law unless the words of themselves clearly import the intention to exclude him. Peachey Mar. Settl. 281; Tyler *v.* Lake, 2 Russ. & M. 188; Massey *v.* Parker, 2 M. & K. 181; Macq. Hus. & Wife, 309. A mere trust, therefore, to pay the income of a fund to a certain married woman, or to her and her assigns, is not sufficient to prevent the marital rights from attaching. Lumb *v.* Milnes, 5 Ves. 517; Brown *v.* Clark, 3 Ves. 166; Spirett *v.* Willows, 11 Jur. N. S. 70. Nor is a devise to a certain widow's sole use and benefit without reference to a future husband. Gilbert *v.* Lewis, 1 De G. J. & M. 38. Even a gift to a wife "for her use" has been held not a sufficiently unequivocal declaration of an intention to create a trust for the separate use of the wife. Jacobs *v.* Amyatt, 1 Madd. 376, *n.*; Wills *v.* Sayers, 4 Madd. 411; Roberts *v.* Spicer, 5 Madd. 491. Some words have greater efficacy than others. Thus it has been said that the word "enjoy" is very strong to imply a separate use. Sir William Fortescue, in Tyrrell *v.* Hope, 2 Atk. 558. And much controversy has arisen in the English chancery courts over the use of the word "own" as synonymous with "sole," the result of which is to establish that there is a substantial distinction between a gift to a wife "for her sole use" and a gift "for her own use," or "for her own use and benefit." See Lord Brougham's judgment in Tyler *v.* Lake, 2 Russ. & M. 187; Johnes *v.* Lockhart, 3 Bro. C. C. 383, *n.*; Peachey Mar. Settl. 282. And it having been decided that the word "own" had no exclusive meaning, it was next determined that a trust to pay the proceeds of real estate into the proper hands of a married woman for her own use and benefit was not a gift to the wife's separate use, the word "proper" being the Latin form of the word "own," and therefore payment into the wife's proper hands signifying the same thing as into her own hands. Tyler *v.* Lake, 2 Russ. & M. 187. Lord Brougham thus in effect overruled a decision of Lord Alvanley, who had held that the use of the word "proper" would create a separate use. Hartley *v.* Hurle, 5 Ves. 545. This later construction, coming from a jurisdiction so conclusive, has since prevailed, though not without some expressions of dissatisfaction in the lower courts. See Vice-Chancellor Wigram, in Blacklow *v.* Laws, 2 Hare, 49; Macq. Hus. & Wife, 309; Peachey Mar. Settl. 282. And again, language of the donor, expressive of his intent to limit property to the wife's separate use, may be controlled by other words or provisions so as to negative such a supposition. This principle was applied to the wife's disadvantage in a case where others were made the objects of the bounty with her. Wardle *v.* Claxton, 9 Sim. 524. And see Gilchrist *v.* Cator, 1 De G. & S. 188. Yet it has been held that a gift to the wife's separate use was good, although the support and education of children was annexed as a charge upon it. Cape *v.* Cape, 2 You. & Coll. Exch. 543. And see *n.* to Macq. Hus. & Wife, 310. The expression "her intended husband" may apply to a second husband, where there are words limiting income to the wife's separate use during her life, for this latter expression controls the former. Hawkes *v.* Hubback, L. R. 11 Eq. 5.

Whether the word "sole" is of itself sufficient to create a separate use is doubtful. Different opinions have been expressed on this point. But in a recent case before Vice-Chancellor Kindersley the word "sole" was deemed insufficient, in a devise of property to a female, her heirs, executors, administrators, and assigns, "for her and their own sole and absolute use and benefit," to create a separate estate; since the

rate estate, in regard to which she is a *feme sole*, the husband, by making her a party, admits it to be her separate estate.[1]

§ 106. **Separate Use binds Produce of Fund.** — A gift of the produce of a fund is to be considered a gift of that produce in perpetuity; hence it is a gift of the fund itself, nothing appearing to show a different intention. Therefore a bequest of a fund to a woman, with the interest thereon, to be vested in trustees, — the income arising therefrom to be for her separate use and benefit, — vests the capital for her separate use.[2] Where a testator simply directs the investment of a fund in trustees, for the benefit of a married woman, independent of the control of her husband, this is enough to carry the whole fund to her separate use.[3] So it is held that where stock was given to trustees upon trust, to pay the dividends to a married woman for her separate use, and there was no limitation of a life interest, an absolute interest in the capital passed to her, which she could dispose of as a *feme sole*.[4]

It is fair to suppose that in equity the wife's separate use binds the produce of the fund as well as the fund itself. There are some cases decided in the courts of common law where the contrary has been maintained, and to this effect, that, although a wife may be entitled to separate property, the dividends arising therefrom vest in her husband.[5] This is no reason, however, why the equity doctrine should not be as we have stated; indeed, if it were otherwise, as an English writer has observed, the object of separate use would be in many instances frustrated.[6] What the wife saves out of her separate income, too, if its identity be properly preserved,

word "sole," as here used, had reference not only to the female herself, but to her heirs, executors, administrators, and assigns, who certainly could not be considered beneficiaries under any such trust. Lewis *v.* Mathews, L. R. 2 Eq. 177. And see Troutbeck *v.* Boughey, L. R. 2 Eq. 534.

[1] Earl *v.* Ferris, 19 Beav. 69.

[2] Adamson *v.* Armitage, 19 Ves. 416; Macq. Hus. & Wife, 311; Troutbeck *v.* Boughey, L. R. 2 Eq. 534.

[3] Simons *v.* Howard, 1 Keen, 7, per Lord Langdale.

[4] 5 Elton *v.* Shephard, 1 Bro. C. C. 532; Haig *v.* Swiney, 1 Sim. & Stu. 487.

[5] Tugman *v.* Hopkins, 4 Man. & Gr. 389; Carne *v.* Brice, 7 M. & W. 183.

[6] See Macq. Hus. & Wife, 291, and *n.* And see *dictum* of Sir Launcelot Shadwell, in Molony *v.* Kennedy, 10 Sim. 254 (quoted *ib.*), which intimates that this is the equity doctrine; per Lord Hardwicke, Churchill *v.* Dibbin, 9 Sim.

is in equity her separate estate.[1] It must only be observed that income or produce of the fund, if once in the husband's hands, may readily be presumed to have been bestowed upon him by the wife, either for himself or the family expenses.

§ 107. **Separate Use exists only during Marriage; Exceptions; Ambulatory Operation.** — The quality of separate estate ceases on the death of the wife; and, if her husband survives her, he becomes entitled to the property as though it had never been settled to her separate use. For the separate use was created only for the marriage state, and was not designed to extend beyond the dissolution of marriage, or when the necessity of the trust should be no longer felt. Thus *choses in possession* settled to the wife's separate use vest in the husband absolutely upon his survivorship.[2] The wife's separate *choses in action* may be recovered by him in his right as her administrator.[3] So, doubtless, her separate chattels real go to the husband as survivor. In short, the wife's separate property, upon the wife's death, is freed from its peculiar incidents, and becomes like any other estate of hers which may remain at her decease.[4] And it seems clear that the husband may be tenant by the curtesy, as usual, if not expressly excluded from all marital interest.[5]

Yet the wife may defeat her husband's claim after her death by exercising her power of disposition during her lifetime, — a power which is recognized in a married woman so far as her separate property is concerned.[6] So, too, by the terms of the trust, the husband's rights on her decease may be prevented from attaching.[7]

447, *n.* *Contra,* Peachey Mar. Settl. 263, where cases are cited which do not support the statement in the text.

[1] Barrack *v.* M'Culloch, 3 Kay & J. 110; Brooke *v.* Brooke, 4 Jur. N. S. 472.

[2] Molony *v.* Kennedy, 10 Sim. 254.

[3] Proudley *v.* Fielder, 2 Myl. & K. 57; Drury *v.* Scott, 4 You. & Coll. Ch. 264; Stead *v.* Clay, 1 Sim. 294.

[4] Macq. Hus. & Wife, 285; Peachey Mar. Settl. 278; Sloper *v.* Cottrell, 6 El. & Bl. 501; Bird *v.* Pegrum, 13 C. B. 650; s. c. 17 Jur. 579.

[5] Lushington *v.* Sewell, 1 Sim. 548; Roberts *v.* Dixwell, 1 Atk. 606, per Lord Hardwicke; Macq. Hus. & Wife, 287; Appleton *v.* Rowley, L. R. 8 Eq. 139; Cooper *v.* Macdonald, L. R. 7 Ch. D. 288. Otherwise, where by the terms of the separate use the husband is excluded from curtesy. Moore *v.* Webster, L. R. 3 Eq. 267.

[6] Macq. Hus. & Wife, 285. See *post,* § 110.

[7] Johnstone *v.* Lumb, 15 Sim. 308. Thus, where a wife entitled to separate property for life, under a settlement

Since the separate use can exist only in the marriage state, it may sometimes have an ambulatory operation, so as to be effectual according as the woman happens at the time to be covert or sole. Supposing, then, a gift be made to the separate use of a woman who is single at the time the gift takes effect, it is clear that she shall enjoy the gift absolutely and without restraint. But if she afterwards marries, will the separate use operate? It will, unless by the terms of her marriage settlement she expressly renounces it.[1] Supposing, however, she outlives her husband, the separate use ceases as in other cases, since it can only be effectual during coverture. But if she marries again, the separate use, consistently with its intention, revives once more; and so onward, from time to time, ceasing and reviving alternately upon each alteration of her personal condition,[2] with, however, this reservation, that if confined by intendment to a particular husband or a particular coverture, the separate use ceases to operate when that marriage ends.[3]

§ 108. **Wife's Right to renounce Separate Use, &c.** — A single woman, having a gift expressed to be to her separate use, may renounce such separate use upon her marriage. This will be readily admitted. Yet the courts construe an act of this sort strictly.[4] The evidence must be clear in all cases, that a single woman marrying has renounced her separate use; for it will not be presumed that she means, by the mere

which directed that all the trust property, and all the income thereof "remaining unapplied" at her death, should go in a certain manner, left her husband some years before her death; and the trustees received the income regularly, and paid it into a bank in their own names, with her privity, making remittances to her as she required money; and upon the wife's death the sum of £888 was found among her effects, and a balance of £2,049 accumulated income stood to the credit of the trustees in the bank; it was held by the Vice Chancellor of England that the former went to the surviving husband by virtue of his marital right, while the latter was bound by the trusts of the deed as the result of income "remaining unapplied" at her death. *Ib.*

[1] Tullett *v.* Armstrong, 1 Beav. 1; Anderson *v.* Anderson, 2 Myl. & K. 427; Macq. Hus. & Wife, 305.

[2] Macq. Hus. & Wife, 306; Tullett *v.* Armstrong, 1 Beav. 1, affirmed by Lord Cottenham, 4 Myl. & Cr. 377; Hawkes *v.* Hubback, L. R. 11 Eq. 5.

[3] 2 Perry Trusts, §§ 652, 653, and cases cited; Benson *v.* Benson, 6 Sim. 26; 1 Ch. Ca. 307; 1 Vern. 7; Moore *v.* Harris, 4 Dr. 33.

[4] Johnson *v.* Johnson, 1 Keen, 648; Macq. Hus. & Wife, 306.

fact of matrimony, to relinquish her control of the property. But antenuptial settlements may be made on reasonable terms by the parties contemplating marriage. And there is nothing to prevent the operation of a trust for separate use from being confined to a particular coverture, where all concerned are so minded. In such cases, however, the wife marrying again can always stipulate for her separate use.[1]

It is possible that a provision for the wife's separate use may fail, as against third parties, *bona fide* purchasers, wherever the husband can dispose of the property without their having notice of the trust.[2]

§ 109. **Separate Use and the Marital Obligations.** — It would appear to be the English doctrine that the marital obligations of the husband are not essentially altered by her right to separate property. Thus, it is held that the wife is not bound to maintain her husband out of her separate fortune, nor to bring any part of it into contribution for family purposes.[3] And there seems to be no legal authority to support the notion that the husband's liabilities on her general debts are thereby altered during their joint lives.[4] The common-law liabilities of the husband, to be sure, rest in great measure upon his right to his wife's property; yet we may admit that it would be difficult to adjust any new rule except upon partnership principles. If one marries a rich wife, therefore, who chooses to hoard her savings by herself, bequeath all to others, and compel him, a poor man, to pay for everything she or the children need, all their lives, he assuming her antenuptial debts besides, it is possible that even equity will deny him relief. We here suppose that neither legislation nor the wife's own disposition of her separate property affects the question.

Moreover, the wife is not bound to maintain, educate, or provide for her children out of her separate property; and

[1] Macq. Hus. & Wife, 307. See Knight *v.* Knight, 6 Sim. 121; Bradley *v.* Hughes, 8 Sim. 149; Benson *v.* Benson, 6 Sim. 126.

[2] Parker *v.* Brooke, 9 Ves. 583; Macq. Hus. & Wife, 291.

[3] Lamb *v.* Milnes, 5 Ves. 520.

[4] See Macq. Hus. & Wife, 288. But see *infra*, chapters 9–12. *In re* Baker's Trusts, L. R. 13 Eq. 168.

even though she elope from her husband, equity will not lay hold of her estate for that purpose.[1] And yet, whenever a settlement of the wife's equity is decreed, where the husband or his legal representative seeks to recover for himself her *choses in action*, the children of the marriage are included within its benefits; though, to be sure, the wife may waive the claim altogether without reference to them.[2]

§ 110. **Clause of Restraint upon Anticipation.** — The clause of restraint upon anticipation is an important element in the doctrine of the wife's separate use, as administered in England. This clause was sanctioned by Lord Thurlow;[3] is frequently to be met with in modern conveyances; and is pronounced by Mr. Macqueen, and by eminent English jurists, a salutary clause which takes from the wife the power of bringing ruin upon herself.[4] The restraint applies not only to personal but also to landed property.[5] It may be imposed equally upon estates for life or in fee.[6]

The name of this important clause originates in the circumstances under which it was first applied.[7] The general purport of this expression is that the wife shall be prohibited the anticipation of the income of her separate property or the anticipation of the capital of the fund. Yet the word "anticipation" need not be used in clauses of this sort, nor is any particular form of expression necessary.[8] Like the separate use itself, this clause of restraint on anticipation exists only in the marriage state; it does not prevent or interfere with the receipt of regular income; and property vested in a single

[1] Hodgden *v.* Hodgden, 4 Cl. & Fin. 323, reversing the decree of the court below.

[2] See Schoul. Hus. & Wife, §§ 160–162; *supra*, § 85, as to the wife's equity to a settlement.

[3] Miss Watson's Case. See Pybus *v.* Smith, 3 Bro. C. C. 340, *n.* This doctrine was afterwards affirmed in Jackson *v.* Hobhouse, 2 Mer. 487, by Lord Eldon.

[4] See Macq. Hus. & Wife, 312.

[5] Baggett *v.* Meux, 1 Phil. 627, per Lord Lyndhurst; 1 Coll. 138; Macq. Hus. & Wife, 312; Peachey Mar. Settl. 284. Nor can she join her husband in a power of attorney to receive or sue for moneys tied up by this clause. Kenrick *v.* Wood, L. R. 9 Eq. 333.

[6] *Ib.*

[7] See Pybus *v.* Smith, 3 Bro. C. C. 340; Jodrell *v.* Jodrell, 9 Beav. 59.

[8] Per Lord Cranworth, *In re* Ross's Trust, 1 Sim. 199; Doolan *v.* Blake, 3 Ir. Ch. 349; Peachey Mar. Settl. 287; Tullett *v.* Armstrong, 1 Beav. 1; Steedman *v.* Poole, 6 Hare, 193; Schoul. Hus. & Wife, § 202, and cases cited.

woman she may dispose of absolutely, despite such limitation, so long as she remains unmarried; but upon her coverture, while retaining such property, the separate use and the restraint upon anticipation attach and become effective together, cease together upon her widowhood, and revive together upon her remarriage.[1]

§ 111. **Separate Use in Common-Law Courts; English Married Womens' Act.** — Although the wife's separate use is the creature of equity, and specially consigned to its watchful keeping, courts of law will sometimes afford it protection. This seems to be, however, only in cases where a trustee is interposed to hold the legal estate; for since the common-law courts maintain their own maxims, there should be some person designated to hold the fund for the wife; and such person will be considered as the legal owner so as to save the property from attachment and sale for the husband's debts.[2]

Under a recent act of 1870 important changes are made with the view of creating a statutory separate estate in married women; these, however, do not as yet attract much judicial comment.[3]

[1] Tullett *v.* Armstrong, 1 Beav. 1; 4 Myl. & Cr. 377; Schoul. Hus. & Wife, § 202; Clarke *v.* Jaques, 1 Beav. 36; Dixon *v.* Dixon, 1 Beav. 40.

[2] See Izod *v.* Lamb, 1 Cr. & J. 35; Davison *v.* Atkinson, 5 T. R. 434; Dean *v.* Brown, 2 Car. & P. 62; Macq. Hus. & Wife, 291.

[3] See Act 33 & 34 Vict. c. 93 (1870); Queen *v.* Carnatic R. R. Co., L. R. 8 Q. B. 299. This act declares that wages and earnings of a married woman shall be her separate property; also, her deposits in savings banks (with a proviso); also, upon the observance of certain formalities, her property in the funds, joint-stock companies, &c.; personal property coming to her not exceeding £200; rents and profits of her freehold property; policies of insurance for benefit of wife (trusts for benefit of wife and children being also permitted).

This moderate act is doubtless the result of influences such as were first manifested in the United States. The American legislation on this subject long antedates the English. Other provisions are found in this act, whose appropriate consideration belongs to a later chapter.

CHAPTER IX.

THE WIFE'S SEPARATE PROPERTY; AMERICAN DOCTRINE.

§ 112. **Early American Rule.** — The doctrine of the wife's separate estate is one of peculiar growth and development in this country, though doubtless originating in the maxims of the English chancery, and deriving much of its strength from the splendid accomplishments of Langdale, Thurlow, and Eldon, in their own land. What such men and their successors effected by judicial policy we have carried into our statutes; nay, we have gone further. In England the equitable rights of married women are the triumph of the bench, with us the early efforts of the bench have been eclipsed by the later achievements of the legislature, and the judge follows the lawgiver to restrain rather than enlarge. There, in historical sequence, it was proper to study first the equitable doctrine of separate property; here the statutory doctrine may well take precedence.

When this country was first settled, the separate use was but little understood in England. Its development there was gradual, and its final establishment of a later date. Our ancestors brought over the common law with them; but for equity they had little respect. True, it cannot be said that, by the jurisprudence of a single State, property bestowed upon a married woman to her separate use, free from the control and interference of her husband, would remain subject, notwithstanding, to his marital dominion; but prior to the late married women's acts there were, in many States, no judicial precedents to combat such an assumption. That such trusts might be created was not denied; but whether there were courts with authority to enforce them appeared

frequently doubtful.[1] In the New England States scarcely a vestige of the separate use was to be found.[2] New York, with such eminent chancellors as Kent and Walworth, took the lead in building up an equity system parallel with that of England; and in the reports of this State are to be found most of the leading cases and the ablest discussions of what may be termed American chancery doctrines. New Jersey recognized the separate use, and her chancery court exercised liberal powers. In Pennsylvania the doctrine was recognized to some extent. The courts of Maryland, Virginia, and the Southern States generally, had frequent occasion to apply the separate-use doctrine; none more so than those of North and South Carolina. And it may be remarked that the aristocratic element of society in that section of the country, also a prevalent disposition for family entails, marriage settlements, and fetters upon the transmission of landed property, aided much in developing therein the English chancery system. So was it in Kentucky and Tennessee, States founded upon like institutions. But as to Ohio, Indiana, Illinois, and the other States erected from what was formerly known as the Northwest Territory, society was modelled more after New England, and we find no clear recognition of the wife's equitable separate use. Louisiana, and such contiguous States as were originally governed by French and Spanish laws had more or less of the civil or community system; and to these States English equity maxims had at best only a limited application. Such, then, is the wife's separate use, viewed in the light of judicial precedents, as known in the United

[1] It is true that the general recognition here of the wife's separate use has been presumed by our text-writers. See 2 Kent Com. 162; Reeve Dom Rel. 162, 2 Story Eq. Juris. § 1378 *et seq.* We confine our observation to judicial precedents. What Chancellor Kent has to say on the American equity doctrines in his work must be taken by the general student with some qualifications, inasmuch as the learned writer draws largely upon his judicial opinions rendered in a State which especially favored chancery jurisprudence. The want of a general recognition of the wife's separate use, as unfolded in England, aids in explaining the curious fact that our States were legislated into a system which the English chancery had felt competent to rear unaided

[2] Jones *v.* Ætna Ins. Co., 14 Conn. 501, intimated that the married woman could not, in Connecticut, be the independent owner of property. But see Pinney *v.* Fellows 15 Vt. 525 (1843).

States until very nearly the middle of the nineteenth century.[1]

But where recognized and enforced at all, the strict American rule was borrowed from that of England, and such, too, has been the later development, as we shall show hereafter.[2]

§ 113. **The Late Married Women's Acts; Social Revolution.** — The wife's separate use, as an American system, or rather as the system of certain American States, had thus progressed when our local legislatures took the whole subject actively in hand. The American equity courts had followed the English precedents pretty closely, but without displaying the same vigor and boldness. None of our reported decisions on the subject of the wife's equitable separate property had attracted popular attention or served to bring out the discussion of strong leading principles, though covering a period of sixty years down to nearly the middle of the present century. During the twenty-five years preceding 1848, a change in public opinion had been gradually wrought in this country and in England, though with us more rapidly than abroad. The married woman of America turned to the legislature rather than the courts of her State for a more complete marital independence, for the right to control her own property, for freedom from the burdens of coverture. In shaping popular sentiment, doubtless, the annexation of territory lately governed by the principles of Roman law had considerable influence, particularly in the States adjacent to Louisiana; still more in a national sense did our rapid advancement as a self-governed nation, and the spread of public education, of independence in life and manners, and of equal social intercourse of the sexes, help on the new reform. The

[1] See U. S. Eq. Dig. Hus. & Wife, 12; Reade *v.* Livingston, 3 Johns. Ch. 481; Meth. Ep. Church *v.* Jaques, 1 Johns. Ch. 65; Rogers *v.* Rogers, 4 Paige, 516; Vernon *v.* Marsh, 2 Green Ch. 502; Steel *v.* Steel, 1 Ired. Eq. 452; Jackson *v.* McAliley, Speers Eq. 303; Boykin *v.* Ciples, 2 Hill Ch. 200, 204; Hunt *v.* Booth, 1 Freem. Ch. 215; Warren *v.* Haley, 1 S. & M. Ch. 647; Hamilton *v.* Bishop, 8 Yerg. 33; Griffith *v.* Griffith, 5 B. Monr. 113; McKennan *v.* Phillips, 6 Whart. 571; Gray *v.* Crook, 12 Gill & J. 236; Howard *v.* Menifee, 5 Pike, 668.

[2] See *post*, as to equitable separate property of married women, in this chapter.

year 1848 saw a wondrous revolution effected in the foremost States of this Union as to the property rights of married women; and this revolution has since extended to every section of the country. The influence of these changes has also been felt abroad; and a like reform was pressed in the English Parliament about 1870, whose immediate result was the statute to which we have already alluded.[1]

In 1821 the legislature of Maine had authorized the wife, when deserted by her husband, to sue, make contracts, and convey real estate as if unmarried, prescribing the mode of procedure in such cases. A like law previously existed in Massachusetts.[2] These appear to have been the earliest of the married women's acts, properly so called: the first-fruits of the modern agitation on woman's rights. The example of Massachusetts and Maine in this respect was soon imitated elsewhere. New Hampshire, Vermont, Tennessee, Kentucky, and Michigan, all passed important laws of a similar character before 1850. The independence of married women whose husbands were convicts, runaways, and profligates became thus the first point gained in the new system. In Massachusetts and Rhode Island the wife's separate use in life-insurance contracts for her benefit was an object of special solicitude; then, in 1845, the former State turned its attention further to a public recognition of marriage settlements and trusts for the wife's separate benefit, extending the equity jurisdiction of its courts for that purpose.[3] The right of a married woman to dispose of her property by will was legalized in Illinois, Pennsylvania, Michigan, and Connecticut about the same time. In Connecticut, Ohio, Indiana, and Missouri, the first reforms appear to have been directed towards exempting the wife's property

[1] See 3 Juridical Society Papers (1870), part 17; Act 33 & 34 Vict. c. 93, 1870, under § 111 *supra*.

[2] See Rev. Sts. Maine (1840), p. 341; Rev. Sts. Mass. (1836), pp. 485, 487.

[3] A New Hampshire act in 1846 copied these provisions; and a statute of Rhode Island in 1844 made similar enactments. These are indications of what the text has already stated; that trusts for separate use and equity jurisdiction on the wife's behalf were little recognized in that section when the married women's agitation commenced in the United States.

from liability for her husband's debts, rather than giving her a complete dominion over it.[1]

The Roman principle of an independent estate in the wife, as modified by the more modern French and Spanish community law, prevailed in Louisiana at the time of its admission into the Union; and like traces appear in the legislation of Florida, Arkansas, Texas, and other adjacent States formerly under French and Spanish rule. So was the doctrine of separate estate promulgated by Mississippi statute as early as 1839.[2] And in other Southern States, as Alabama and North Carolina, where chancery jurisprudence was well established, appeared laws investing the courts with larger powers in matters of this sort.[3] Alabama and Mississippi appear to have first postponed the husband's liability for his wife's antenuptial debts to her separate estate.[4]

But the sweeping changes effected by the legislature of New York in 1848 deserve more than a passing notice. The debates of the constitutional convention of that State in 1846 evinced the growing desire for a radical reform in the property rights of married women; and the advocates of the movement, failing in their attempt to secure an article of amendment to the State constitution on their behalf, next addressed themselves to the legislature, and with success. On the 7th of April, 1848, was enacted a law "for the more effectual protection of married women," which provided that the real and personal property of any female already married, or who may hereafter marry, which she shall own at the time of marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property as if she were a single female; and that any married female may lawfully receive and hold property in like manner

[1] See 2 Bright Hus. & Wife, Am. ed. 1850, p. 627 *et seq.*, where married women's acts are cited by Mr. Lockwood; 2 Kent Com. 130, *n.*

[2] See 2 Bright, *ib.* The influence of a large commercial city like New Orleans was doubtless felt in the sparsely settled territory surrounding it. The codes of these States were all disfigured by "chattel" provisions, which detracted much from the merits of a policy otherwise humane to the wife.

[3] 2 Bright, *ib.*

[4] *Ib.* (1846).

from any person other than her husband, whether by gift, grant, devise, or bequest. This statute, passed at such a time by the foremost State in the Union, — a State thoroughly northern in its institutions, while the recognized champion of chancery principles, — could not fail to make a deep national impression.[1] A parallel movement had meanwhile progressed in Pennsylvania; and in that State an act of the legislature, dated only four days later, conferred substantially the same rights of property upon married women, though expressed in different language.[2]

From this time forth the revolution became rapid, and has since extended to all the States, Virginia being the last to yield. And the work of legislative change still goes on. Scarcely a year passed between 1850 and 1870 without some new married women's acts added to the local statute books;[3]

[1] We give the substance rather than the language of this statute. See 2 Bright Hus. & Wife, Am. ed. 1850, Lockwood's note, 581 *et seq.* This statute was afterwards considerably modified by acts of 1849, c. 375, and 1860, c. 90, § 1.

[2] Bright, *ib.*, p. 648; Laws Penn. 1848, pp. 536–538. It should be said that both Maine and Michigan had enacted laws in 1844, giving enlarged powers to the wife to hold and dispose of separate property, thus anticipating some of the statutory changes both in New York and Pennsylvania. Rev. Stat. Mich. (1846) p. 340; Maine Statutes, March 22, 1844.

[3] The acts now in force, many of them perplexing, which need not here be detailed, will be found summarized to 1882 in School. Hus. & Wife, Appendix. More or less liberality is shown in different States in the legislative grant of separate property, but the tendency on the whole is to place the married woman on the footing of a *feme sole* in respect of property and kindred rights of suit and contract.

In the Southern Law Review, vol. 6, p. 633, will be found an instructive article by Professor Henry Hitchcock, commenting upon marital property rights as defined by American statutes in force in 1880. Detailing the statutory changes which have occurred, the author calls attention to the fact that in Connecticut, beginning with the act of 1845, there were eleven successive statutes passed at intervals during the twenty-one years ending in 1866. And see Jackson *v.* Hubbard, 36 Conn. 10, on this point. Afterward another statute was passed in this State in 1869, and still another in 1872, and then, at the general revision of the statutes in 1875, a further amendment took place. This is a marked, but not exceptional, instance of State innovations in the law of Husband and Wife. Between 1850 and 1860 inclusive, notes the writer, the following States began their married women's legislation, some boldly, others timidly: Indiana, Missouri, New Jersey, Kansas; Ohio, and Illinois followed in 1861, and other States successively in subsequent years. In 1869 Congress enacted, for the benefit of married women in the District of Columbia, one of the most radical laws on the subject. The last State to fall into line was Virginia, in 1877.

and with regard to woman in general, the constant tendency has been to enlarge her freedom of action, and open to her sex pursuits hitherto closed against them.

§ 114. **Scope of Married Women's Acts; Constitutional Points.** — The main principles touching the acquisition of a statutory separate property by the wife, as an American system of positive law, we shall now consider as fairly as circumstances permit. And, first, it may be remarked in general that these American married women's acts are designed for woman's benefit, and that they do not limit, but rather extend, her right to beneficially hold separate property.[1] Where she is held to be restricted by the statute at all, it is generally with reference to the right of disposition, and in order that others may not subject it to the fulfilment of her engagements.[2] We shall presently see, moreover, in the course of our exposition, that the doctrines of an equitable separate estate in the wife are generally invoked at this day as furnishing a system available for her advantage, wherever (as rarely happens) the statutory privileges, in any particular instance, prove less adequate for establishing her independent property relations; the main policy of the married women's acts being not to supersede the wife's equitable rights, but to enlarge her legal status, and correct the old anomaly which left her a person in equity but none in law.

These statutes are not subject to mere technical construction, but the will of the legislature should be fairly interpreted. The legislative will is not presumed to be so exerted as to operate retrospectively. "A retrospective statute, affecting and changing vested rights," observes Chancellor Kent, "is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void."[3] The whole current of American

[1] Blevins *v.* Buck, 26 Ala. 292.

[2] See Davis *v.* Foy, 7 S. & M. 64; Pond *v.* Carpenter, 12 Minn. 430; Pippen *v.* Wesson, 74 N. C. 437. The subject of the wife's right of disposition is discussed in a later chapter.

[3] 1 Kent Com. 455. Various national and State constitutional provisions — as, *e. g.*, that no one shall be deprived of property "without due process of law," and against impairing the obligation of contracts — have a similar bearing.

decisions confirms that statement; and thus is it with our married women's acts, for they necessarily reduce the property rights of the husband as prevalent under the common law of coverture. The respective rights of a husband and wife, duly married, in property acquired in any State, before fundamental law or appropriate legislation therein has changed the old rule, must be governed by the rules of the common law.[1] Where a complete legal estate in the wife's lands has already vested in the husband, it is not taken away from him.[2] The effect of a previous conveyance of land to husband and wife jointly is not changed in respect of survivorship.[3] The wife's personal property already in possession or reduced to possession by the husband is his.[4] And, to go still further, in her *choses in action*, or unreduced personalty which he is already at liberty to reduce, there is a valuable existing interest capable of assignment and transfer, — a vested right in the husband which a subsequent statute or State constitutional provision cannot deprive him of, according to the better opinion.[5]

The interest of a husband in remainder in property already bequeathed to his wife on the contingency of surviving a life tenant is held to be a vested right in such a sense that it cannot be taken away by a married woman's act passed before the contingency happens.[6] And, in general, an interest vested in the husband, though in a certain sense contingent, which

[1] Carter *v.* Carter, 14 S. & M. 59; Schoul. Hus. & Wife, § 211, and cases cited; Eldridge *v.* Preble, 34 Me. 148; Quigley *v.* Graham, 18 Ohio St. 42; Farrell *v.* Patterson, 43 Ill. 52; Coombs *v.* Read, 16 Gray, 271. So, rights acquired subsequently under a foreign government. Dubois *v.* Jackson, 49 Ill. 49.

[2] Bouknight *v.* Epting, 11 S. C. 71. And hence the husband's interest therein can be taken and sold on execution. *Ib.*

[3] Almond *v.* Bonnell, 76 Ill. 536.

[4] Buchanan *v.* Lee, 69 Ind. 117.

[5] See Dunn *v.* Sargent, 101 Mass. 339; Westervelt *v.* Gregg, 12 N. Y. 202; Ryder *v.* Hulse, 24 N. Y. 372; Stearns *v.* Weathers, 30 Ala. 712; Kirksey *v.* Friend, 48 Ala. 276. Such is the rule with reference to a legacy bequeathed to a wife, and taking effect before the passage of an act vesting all such property in the married woman: Norris *v.* Beyea, 13 N Y. 273, 288; or her distributive share, accruing previously in an estate: *Ib.*; Kidd *v.* Montague, 19 Ala. 619; Sperry *v.* Haslam, 57 Ga. 412; or her stock, mortgages, and incorporeal property generally. See Schoul. Hus. & Wife, § 211, *n.*, commenting upon Clark *v.* McCreary, 12 S. & M. 347, *contra*.

[6] Dunn *v.* Sargent, 101 Mass. 336.

is not a mere expectancy or bare possibility, like that of an heir from his living ancestor who may yet disinherit him by will, but is an interest already created and existing, which is descendible, transmissible, and capable of transfer, is not to be taken away by subsequent legislation in the wife's favor.[1] In like manner the husband's vested life estate by way of curtesy initiate in his wife's lands cannot be taken away by legislative enactment, any more than the wife's inchoate right of dower in her husband's lands.[2] Nor can any interest which a husband, before the passage of the act, has in his wife's real estate be thus devested.[3]

In some States all these constitutional perplexities are obviated by legislation which embraces simply such property as may be held or acquired by women marrying after the passage of the act.[4] But the married women's acts or constitutional amendments usually operate upon parties occupying already the conjugal relation, as the statute language shows, and upon those who as a fact are likely each to have married with some reference to the pecuniary expectations of the other. To protect a husband's interests to any such extent, however, on any constitutional suggestion on his behalf, the courts appear uniformly to decline; for, as it has been observed, the marriage contract does not imply that the husband shall have the same interest in the future acquisitions of the wife that the law gives him in the property she possesses at the time of the marriage, but rather that she shall have whatever interest the legislature, before she is invested with them, may think proper to prescribe.[5] In other words, while the hus-

[1] Gray, J., in Dunn *v.* Sargent, 101 Mass. 336; Shaw, C. J., in Gardner *v.* Hooper, 3 Gray, 398.

[2] Rose *v.* Sanderson, 38 Ill. 247; Dayton *v.* Dusenbury, 25 N. J. Eq. 110. Rents of the wife's land, too, accruing before her death and prior to the new constitutional provision as to married women's rights, go with the curtesy, and not to the wife's heirs. Matthews *v.* Copeland, 79 N. C. 493.

[3] Burson's Appeal, 22 Penn. St. 164; Prall *v.* Smith, 31 N. J. L. 244; Wythe *v.* Smith, 4 Sawyer, 17.

The increase of domestic animals purchased by the husband before the passage of the married woman's act belongs to him, and not to his wife. Hazelbaker *v.* Goodfellow, 64 Ill. 238.

[4] See Maclay *v.* Love, 25 Cal. 367. Cf. Rugh *v.* Ottenheimer, 6 Oreg. 231.

[5] Sleight *v.* Read, 18 Barb. 159; Southard *v.* Plummer, 36 Me. 64.

band's vested rights arising under a marriage cannot be constitutionally disturbed by an alteration of the law, his mere expectancy, or the possibility of some future acquisition by right of marriage, is subject to any change which the legislature may choose to make prior to the vesting of a right in the husband.[1] And whatever a married woman may have acquired subsequently to the passage of an appropriate act by gift, devise, bequest, and so on, becomes her statutory separate estate, and all parties concerned must govern themselves accordingly.[2]

A corresponding rule of constitutional limitations applies to the rights and liabilities of the wife under these acts, as to her title by gift or purchase, and as to her dominion over her property generally,[3] of which we are to speak hereafter.

§ 115. **Married Women's Acts as to Antenuptial Property and Acquisitions from Third Persons.** — Our married women's codes fairly correspond in permitting the wife (subject to constitutional limitations) to hold, in her sole and separate right, all the property, real or personal, which she had at the time of marriage, or has acquired thereafter from any person other than her husband, by gift, grant, devise, or bequest. Real estate thus held or acquired is regarded, not as land of which the husband enjoys the beneficial use, but as her separate land. Leasehold property may be thus held and enjoyed by the wife.[4] Her personal property, whether in possession or lying in action, is her own, provided the statute description be fulfilled. A married woman, transferring stock after marriage from her maiden to her married name, may retain it as her separate property.[5] Notes, bonds, or other evidences of debt, and incorporeal property,[6] pass to her as well as

[1] Cooley Const. Limitations, 360–362; Holliday *v.* McMillan, 79 N. C. 315; Gray, J., in Dunn *v.* Sargent, 101 Mass. 336; Hill *v.* Chambers, 30 Mich. 422.

[2] Cherokee Lodge *v.* White, 63 Ga. 742; Nevius *v.* Gourley, 95 Ill. 206.

[3] Bryant *v.* Merrill, 55 Me. 515; Clark *v.* Clark, 20 Ohio St. 128; Lee *v.* Lanahan, 58 Me. 478. See, further, Schoul. Hus. & Wife, § 213.

[4] Vandevoort *v.* Gould, 36 N. Y. 639; Prevot *v.* Lawrence, 51 N. Y. 219. As to land damages and equity to land, see State *v.* Hulick, 33 N. J. 307; Sharpless *v.* West Chester, 1 Grant, 257; Prout *v.* Hoge, 57 Ala. 28.

[5] Mason *v.* Fuller, 36 Conn. 160.

[6] Selden *v.* Bank, 69 Penn. St. 424.

corporeal property; animate as well as inanimate property;[1] money, which of course is personal property.[2]

§ 116. **Change of Investment; Increase and Profits.** — Property acquired by exchange for the wife's statutory property is presumably her separate property likewise, as where one horse is exchanged for another.[3] And since the income of her separate fund is hers, property purchased with her savings from interest arising out of her separate funds belongs to her as her separate property.[4] Upon a sale and exchange of the wife's separate, as contrasted with her general, lands, the proceeds belong to the wife.[5] And where her realty, as in partition proceedings, is converted into money, the proceeds stand in lieu of the real estate for her benefit.[6] Equity comes in aid of these principles, where statutory remedies are inadequate, and indeed of numerous kindred rules under the married women's acts.

The natural increase and profits of the wife's statutory separate property, including the progeny of her separate domestic animals, and the rents of her separate lands or the crops, are usually to be construed hers and at her disposal during marriage, as well as the property which produced the increase and profits.[7] If it were rightly held otherwise, this would be on some construction that the wife had, by her acts and conduct, acquiesced in her husband's assumption of the ownership.[8] In short, all the product and increase of the original property will become the wife's as long as she can follow and identify it,[9] though expenditure of income for authorized family purposes may well be presumed.[10]

§ 117. **Methods of Transfer from Third Parties under these Acts.** — Where the property is such as can pass without a

[1] Gans *v.* Williams, 62 Ala. 41.

[2] Mitchell *v.* Mitchell, 35 Miss. 114.

[3] Pike *v.* Baker, 53 Ill. 163.

[4] Merritt *v.* Lyon, 3 Barb. 110.

[5] Brevard *v.* Jones, 50 Ala. 221.

[6] Nissley *v.* Heisey, 78 Penn. St. 418; Rice *v.* Hoffman, 35 Md. 344.

[7] Williams *v.* McGrade, 13 Minn. 46; Hanson *v.* Millett, 55 Me. 184; Gans *v.* Williams, 62 Ala. 41; Hutchins *v.* Colby, 43 N. H. 159; Stout *v.* Perry, 70 Ind. 501. But as to products of the land occupied by the family, cf. Moreland *v.* Myall, 14 Bush, 474; Hill *v.* Chambers, 30 Mich. 422.

[8] But see peculiar statute construed in Chambers *v.* Richardson, 57 Ala 85.

[9] Holcomb *v.* Meadville Savings Bank, 92 Penn. St. 338.

[10] See Chambers *v.* Richardson, 57 Ala. 85.

written transfer or conveyance, a gift or sale to the wife, of statutory separate property, may be by parol;[1] although, of course, all proof must consist with the idea that delivery is for her sole and separate use, and not so as to admit the rights of her husband.[2] Where a conveyance or other written instrument is needful, the expression must likewise conform to the legislative intent; and even where the language of the statute is broad enough to dispense with such phrases as "sole and separate use," the wife's only safety consists in having her name used as that of grantee or transferee, instead of the husband's.[3] Where it comes to an expression of separate use, under some instrument made on the wife's behalf, an equitable separate use, rather than a statutory separate use, may be said to have been created; though authorities style it under some local acts as a statutory separate estate.[4]

§ 118. **Acquisitions from Husband not so much Favored.** — But as concerns acquisitions of the wife from her husband, the married women's acts by no means concur in making this her statutory separate estate, as they do where the acquisition is derived from some third party. Some local legislatures, to be sure, have gone as far as this, but by no means the greater number.[5] Hence we may defer the discussion of earnings, pin-money, postnuptial settlements, and gifts from husband to wife until later chapters of this treatise are reached, when the equitable doctrine will be considered in the same connection. A title to separate statutory property cannot be vested in the wife on her husband's credit, where

[1] Tinsley *v.* Roll, 2 Met. (Ky.) 509.

[2] Walton *v.* Broaddus, 6 Bush, 328.

[3] Pepper *v.* Lee, 53 Ala. 33; Slaughter *v.* Glenn, 98 U. S. Supr. 242; Robinson *v.* O'Neal, 56 Ala. 541; Campbell *v.* Galbreath, 12 Bush, 459. Under the more sweeping local statutes a conveyance to a married woman need not state that she is to hold it to her separate use. Sims *v.* Rickets, 35 Ind. 181.

[4] A conveyance of lands in Alabama to a married woman, "to have and to hold to the sole and proper use, benefit, and behoof of her, her heirs and assigns for ever," vests in her, under the laws of that State, a statutory separate estate. Lippincott *v.* Mitchell, 94 U. S. Supr. 767. And see Swain *v.* Duane, 48 Cal. 358; Evans *v.* Nealis, 69 Ind. 148.

[5] See Towle *v.* Towle, 114 Mass. 167; Jenkins *v.* Flinn, 37 Ind. 349.

the statute only recognizes her right to acquire from third persons, any more than it could by his money.[1] And such is the temptation to making colorable transfers to one's wife in fraud of creditors, that in controversies over title, where the legislation discourages acquisitions from the husband, the wife, as against the husband and his creditors and representatives, has been held quite strictly to her proofs of acquisition from a person other than her husband,[2] unless, at all events, there are writings which run so as suitably to give her the the legal title instead.[3]

Where a husband purchases land or personalty with his own money, and conveys or transfers it to his wife, through a trustee or otherwise, the question becomes ordinarily one of postnuptial settlement or gift, with equitable rules such as we shall consider hereafter; though sometimes the married women's act is broad enough in scope to confer the right of separate property acquisition, as such, from a husband, as well as from third persons. If, on either theory, the title vests in the wife, as of her separate right, the proceeds thereof, or the specific re-investment, is the wife's also. Where the husband appropriates such proceeds or takes other property in his own name, equity and modern statutes between them may preserve the wife's rights; she may, in the usual manner, follow her title into the new property, or else regard her trustee as remiss in duty and indebted to her.

Again, the wife is permitted to bestow her statutory separate property upon her husband, or waive her statutory rights to a considerable extent. Thus, it is held that money used by the husband with the wife's knowledge and consent, in payment of ordinary household expenses, and without any agreement for repayment to her on his part, cannot be recovered from his estate afterwards.[4] The husband may reduce to possession his wife's outstanding personals in action; but out of regard to her statutory rights, the doctrine now

[1] Hopkins *v.* Carey, 23 Miss. 54; Worth *v.* York, 13 Ired. 206.

[2] See Reeves *v.* Webster, 71 Ill. 307; Johnson *v.* Johnson, 72 Ill. 489.

[3] Lyon *v.* Green Bay R., 42 Wis. 548.

[4] Cartwright *v.* Cartwright, 53 Iowa, 57.

becomes of somewhat novel application, and evidence of the wife's consent is properly required in many States before the husband's act of appropriation shall be considered complete. For while she may bestow her goods and chattels upon him, under suitable circumstances, he can no longer go to work, as he could at the common law, and make his title complete without reference to her wishes.[1] Nor has the debtor or custodian of the incorporeal property, or the executor or administrator who settles the estate in which the married woman may have a legacy or distributive share accruing to her, the right to recognize the husband as entitled to her exclusion, or to pay over to him on his sole and unauthorized receipt.[2]

§ 119. **Husband's Control; Mixing Wife's Property or Keeping it Distinct.** — The greatest source of perplexity, in truth, in these married women's acts, arises out of the effort at elimination of the husband's control in the wife's statutory property; for here the safeguards usual in equitable trusts are wanting. Nor are States agreed in the course to pursue, since the policy in one is to emancipate the wife from property restraints, while another grudges the change as tending to strip the husband of his matrimonial rights. A married woman, in order to preserve her separate property, should keep it distinct from that of her husband; and especially does the rule hold true in States where presumptions are against her exclusive right. Thus it is held that if a married woman willingly allows what she might have retained as her separate property to be so mixed into a common mass with that of the husband as to be undistinguishable, or acquiesces in leaving it so, it must, as to her husband's creditors, be treated as relinquished to him.[3] So, too, land or other property

[1] Vreeland *v.* Vreeland, 1 C. E. Green, 512; King *v.* Gottschalk, 21 Iowa, 512; Haswell *v.* Hill, 47 N. H. 407.

[2] *Aliter*, if the husband's receipt was authorized by the wife. Hobensack *v.* Hallman, 17 Penn. St. 154. Some of the local statutes are held not to restrain the husband from collecting and reducing to possession his wife's *choses in action*. Clark *v.* Bank of Missouri, 47 Mo. 17.

[3] Glover *v.* Alcott, 11 Mich. 470; Gross *v.* Reddy, 45 Penn. St. 406; Kelly *v.* Drew, 12 Allen, 107; Chambers *v.* Richardson, 57 Ala. 85; Humes *v.* Scruggs, 94 U. S. Supr. 22.

bought by the husband with his wife's money, but in his own name, and without any agreement that the purchase shall be to her separate use, or the title taken in her name, will not, as a rule, be treated as her separate property.[1] If certain property be purchased in part from her own funds, and in part from her husband's, whatever the form of the investment, her title extends only to the amount of her investment.[2]

On the other hand, where the husband has kept his wife's funds distinct from his, though changing investments from time to time, and preserved the ear-marks, so to speak, her right to claim the property from his estate, upon surviving him, has been strongly asserted.[3]

So discordant is our married women's legislation, however, that in New York, where presumptions lean strongly to the wife's side, it is held that if household furniture belonging to a wife, and acquired from her father, is, with her consent, taken to the common dwelling, mingled with the husband's furniture, and used therewith for the common household purposes, it does not thereby become her husband's property, but the title remains in her.[4] This doctrine, however, is applied as between the wife or her assignee, and the husband himself;[5] and as to *bona fide* third parties for value without notice, the assertion of a wife's title as against those who have given credit to a husband in possession requires the nicest discrimination on the part of the court. Property bought by a husband with money belonging to his wife will in general be presumed to be his own until the contrary is shown;[6] and even property bought by the husband with money from the wife, which is placed in his hands for such investment in his

[1] Kidwell *v.* Kirkpatrick, 70 Mo. 214

[2] Hopkins *v.* Carey, 23 Miss. 54; Worth *v.* York, 13 Ired. 206; Haines *v.* Haines, 54 Ill. 74. Under Maine statutes, property conveyed to a married woman, but wholly or partly paid for by her husband, may be reached by the husband's creditors to the extent of his interest. Call *v.* Perkins, 65 Me. 439.

[3] Fowler *v.* Rice, 31 Ind. 358; Richardson *v.* Merrill, 32 Vt. 27; McCowan *v.* Donaldson, 128 Mass. 169; Schoul. Hus. & Wife, § 219, and numerous cases cited.

[4] Fitch *v.* Rathbun, 61 N. Y. 579.

[5] *Ib.*

[6] Moye *v.* Waters, 51 Ga. 13. But see next c. as to his agency.

name and for his benefit, is liable to seizure for his debts, notwithstanding she borrowed the money.[1] A wife may have an equitable right to pursue her funds invested by her husband, while, until this right is asserted, the husband retains a legal title of which a *bona fide* transferee for value may perhaps avail himself by way of a countervailing equity.[2]

§ 120. **Husband as Wife's Trustee in this Connection.** — The husband, while the marriage relation lasts, may hence become bound as trustee of his wife's statutory separate estate, not only by express appointment, but through implication, as under the equity rule.[3] In certain States, such as Connecticut and Alabama, the husband is specially designated by statute as his wife's trustee,[4] — a peculiarity of legislation which is attended with peculiar consequences as to the legal title of such property. And since the opportunities afforded him for mixing up her property with his are very great, in the present raw age of our married women's legislation, we often find her, upon surviving him, a general creditor against his estate, or the claimant of a trust fund which cannot easily be identified.[5] Unlike the wife's separate estate in equity, the separate property of a married woman under American statutes seems sometimes to retain its qualities after her death, so that her administrator often claims it against her surviving husband.[6] It would appear that in general the agency of the husband in selling, exchanging, or managing his wife's separate statutory property may be previously conferred or ratified afterwards by the wife.[7]

[1] Nelson *v.* Smith, 64 Ill. 394.

[2] See Holly *v.* Flournoy, 54 Ala. 99.

[3] Walter *v.* Walter, 48 Mo. 140; Hall *v.* Creswell, 46 Ala. 460; Wood *v.* Wood, 83 N. Y. 575; Patten *v.* Patten, 75 Ill. 446.

[4] Sherwood *v.* Sherwood, 32 Conn. 1; Marsh *v.* Marsh, 43 Ala. 677. The personal property of a married woman, which is by the statute vested in the husband as her trustee, is not in legal strictness her sole and separate estate, unless the husband transfers it to the wife or relinquishes his right with regard to it. Williams *v.* King, 43 Conn. 569.

The husband may sue, "as trustee of" his wife, to recover rents, income, and profits of his wife's statutory separate estate. Bentley *v.* Simmons, 51 Ala. 165.

[5] Martin *v.* Curd, 1 Bush, 327; Hause *v.* Gilger, 52 Penn. St. 412; Fowler *v.* Rice, 31 Ind. 258.

[6] Leland *v.* Whitaker, 23 Mich. 324.

[7] Lichtenberger *v.* Graham, 50 Ind. 288. See next c.

§ 120 *a*. **Presumptions as to Separate Property under these Acts.** — We must here bear in mind that the married women's acts have reference, not to the wife's property in the mass, but to property suitably acquired by her in certain instances by way of exception to the old rule of coverture. Broad, therefore, as they may often appear, these statutes are considerably restrained by judicial construction and the application of presumptions. In Massachusetts, Maine, California, Wisconsin, Illinois, and other States, the presumption is still, in absence of suitable words or circumstances manifesting an intent on the part of those interested to claim the benefits of the statute, that a married woman's property belongs to her husband as at the common law; and his possession of the property, undisputed and unexplained, or even a visible possession thereof in connection with his wife, gives him the marital dominion.[1] In Pennsylvania the courts were at first disposed to rule otherwise, but they, too, have finally settled upon the same presumption.[2] On the other hand, the New York courts approve the new system to its widest extent, thus far; and it would appear that married women in that State are well-nigh emancipated altogether from marital restraints, so far as concerns their property, while the husband's own rights therein are exceedingly precarious.[3] To ascertain as a fact whether the ownership be in wife or husband, evidence of how the matter was understood and treated between the spouses may be quite essential;[4] for a sort of joint possession

[1] Eldridge *v.* Preble, 34 Me. 148; Smith *v.* Henry, 35 Miss. 369; Alverson *v.* Jones, 10 Cal. 9; Farrell *v.* Patterson, 43 Ill. 52; Reeves *v.* Webster, 71 Ill. 307; Stanton *v.* Kirsch, 6 Wis. 338; Smith *v.* Hewett, 13 Iowa, 94. *Contra*, Johnson *v.* Runyan, 21 Ind. 115; Stewart *v.* Ball, 33 Mo. 154. While a husband and wife both live on her land held as general estate, the possession of the products is presumptively his. Moreland *v.* Myall, 14 Bush, 474. But cf. Hill *v.* Chambers, 30 Mich. 422.

[2] Cf. Gamber *v.* Gamber, 18 Penn. St. 363; Winter *v.* Walter, 37 Penn. St. 157; Bear's Administrator *v.* Bear, 33 Penn. St. 525; Gault *v.* Saffin, 44 Penn. St. 307; with Goodyear *v.* Rumbaugh, 13 Penn. St. 480. And see Curry *v.* Bott, 53 Penn. St. 400. Under the law of Tennessee, direct gifts to the wife enure to the husband, unless the separate estate intention is clearly expressed. Ewing *v.* Helm, 2 Tenn. Ch. 368.

[3] Peters *v.* Fowler, 41 Barb. 467; Knapp *v.* Smith, 27 N. Y. 277.

[4] Hill *v.* Chambers, 30 Mich. 422. In this State the obvious inclination is to determine, not by presumptions or inferences, but upon the facts. *Ib.*

on their part is often the practical situation of the case.[1] And thus does one State regard the wife's right to her own acquisitions as the rule, and another as the exception.

§ 121. **Schedule or Inventory of Wife's Property.** — The requirement in a few States is that the wife's separate property shall be scheduled or inventoried in order to receive legal protection for her separate benefit.[2]

§ 122. **Statutory and Equitable Separate Property.** — In New York and Mississippi it is held that the married women's act does not oust the original jurisdiction of courts of equity in cases affecting the separate estates of married women.[3]

[1] Gamber *v.* Gamber, 18 Penn. St. 363. And see Kenney *v.* Good, 21 Penn. St. 349. As the rule is usually expounded, presumptions bear heavily against the wife in contests of title, but more especially where the rights of a husband's creditors are affected by the decision. "Between strangers," it is observed in a Pennsylvania case, "open, visible, notorious, and exclusive possession is the test of title in all cases where the rights of creditors are involved. But this is not possible with reference to the personal goods of a married woman. She cannot have or use her property exclusively, unless she lives apart from her husband. It was not the intention of the legislature to compel a separation in order to save the wife's rights; but if the rule of exclusive possession were adopted, the statute would be inoperative as long as they live together. But this shows how necessary it is to demand the clearest proof of the wife's original right." Gamber *v.* Gamber, *supra.*

[2] Price *v.* Sanchez, 8 Fla. 136; Humphries *v.* Harrison, 30 Ark. 79; Selover *v.* Commercial Co., 7 Cal. 266; Schoul. Hus. & Wife, § 222. This registry law, after having called for considerable construction in the courts, appears to have finally been repealed in Iowa. Schmidt *v.* Holtz, 44 Iowa, 448.

[3] Mitchell *v.* Otey, 23 Miss. 236; Colvin *v.* Currier, 22 Barb. 371 (Strong, J., dissenting). See the recent case of Wood *v.* Wood, 83 N. Y. 575, where Folger, C. J., observes that the married women's acts, by their own operation, changed the wife's capacity to hold a separate estate as a matter of equity into a legal estate. So, too, in a Michigan case, it is observed that, as regards the wife's individual property, the married women's legislation has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies. Snyder *v.* People, 26 Mich. 106. And see Clawson *v.* Clawson, 25 Ind. 229. That this legislation, properly so called, does not profess to operate upon the family relation, or take from the husband his marital rights, except as pertaining to property, is frequently insisted upon. Snyder *v.* People, 26 Mich. 105.

"The estate thus assured to the wife," as a Pennsylvania case well observes, "is only analogous to the equitable separate estate, and is seriously modified by the fact that she has no trustee separate from her husband; and that he, therefore, as the legal guardian of her rights, necessarily becomes, in a large sense, her trustee, but without all of the law's suspicion of his dealing with the trust property, for the community of interests and sympathies of husband and wife for-

§ 123. **American Equity Doctrine; Trustee for Separate Property.** — Doubtless the married women's acts have given a fresh impulse to the equitable protection of married women's property, which, as we have stated, had been quite sparingly exercised in the United States prior to the first legislative enactments on this subject. Where the separate use has been recognized and enforced at all, the strict American rule was always borrowed from that of England. And the latest cases show an increasing liberality to the wife in our courts of equity. Thus it has been frequently said that the wife's separate estate requires no trustee to sustain it.[1] For when no other trustee is interposed, the courts of chancery are prepared to treat the husband as such by virtue of his possession and control of the fund.[2] And one may, by his acts, make himself a trustee *sub modo* to support the wife's separate use.[3] Even a purchaser, still more a volunteer, taking possession of the trust property, with a notice of the trust, will be made a trustee in chancery.[4]

§ 124. **Equity Doctrine; How Separate Use Created.** — So, too, an intention clearly manifested to create a separate estate has always been deemed necessary in our courts, in order to exclude the husband's marital rights. The mere intervention of a trustee is insufficient.[5] The language employed, if language be necessarily relied on, must be suitable.[6] And provisions for the sole and separate use, support, and main-

bid this." Lowrie, C. J., in Walker *v.* Reamy, 36 Penn. St. 410, 414.

[1] McKennan *v.* Phillips, 6 Wh.art. 571; Thompson *v.* McKusick, 3 Humph. 631; Fellows *v.* Tann, 9 Ala. 999; Trenton Banking Co. *v.* Woodruff, 1 Green Ch. 117.

[2] Boykin *v.* Ciples, 2 Hill Ch. 200; Hamilton *v.* Bishop, 8 Yerg. 33; Wallingsford *v.* Allen, 10 Pet. 583; Porter *v.* Bank of Rutland, 19 Vt. 410; Schoul. Hus. & Wife, § 224, and cases cited; Pepper *v.* Lee, 53 Ala. 33; Richardson *v.* Stodder, 100 Mass. 528.

[3] Sledge *v.* Clopton, 6 Ala. 589.

[4] Jackson *v.* McAliley, Speers Eq. 303; Fry *v.* Fry, 7 Paige, Ch. 461.

[5] Hunt *v.* Booth, 1 Freem. Ch. 215; Evans *v.* Knorr, 4 Rawle, 66; Taylor *v.* Stone, 13 S. & M. 653; Schoul. Hus. & Wife, § 225.

[6] Thus, in North Carolina, the words, "for her use," have been held sufficient to exclude the husband's dominion. Steel *v.* Steel, 1 Ired. Eq. 452. So, too, the words, "for the entire use, benefit, profit, and advantage." Heathman *v.* Hall, 3 Ired. Eq. 414. But in South Carolina, the words, for "the use of his wife," are held insufficient. Tennant *v.* Stoney, 1 Rich. Eq. 222; M'Donald *v.* Crockett, 2 McC. Ch. 130. In Kentucky, the words, "for her own proper use and benefit," are held sufficient. Griffith *v.* Griffith, 5 B. Monr. 113. Such, too, seems to have been

tenance of a wife and children are frequently sustained, though the trust does not vest their respective interests consecutively.[1] As in England, our courts permit an estate to be so settled on an unmarried female as to exclude the marital rights of any future husband.[2]

the rule in Alabama. Warren *v.* Halsey, 1 S. & M. Ch. 647. The words "to the use and benefit" are held sufficient in Tennessee. Hamilton *v.* Bishop, 8 Yerg. 33. So in Alabama, words importing enjoyment "without let, hindrance, or molestation whatever." Newman *v.* James, 12 Ala. 29. And where one clause of a will applies the words, "in trust for the separate use," to certain property, and another applies to certain property the words "in trust" only, the separate use may by construction embrace the whole. Davis *v.* Cain, 1 Ired. Eq. 304. The word "exclusively" in the wife's favor is held to exclude the husband. Gould *v.* Hill, 18 Ala. 84. So, too, "to be hers and hers only." Ellis *v.* Woods, 9 Rich. Eq. 19; Ozley *v.* Ikelheimer, 26 Ala. 332.

Trust, to pay income to a wife "for and during the joint lives of her and her husband, taking her receipt therefor," is held to give her a sole and separate estate in the income. Charles *v.* Coker, 2 S. C. N. S. 122. Trust to "exclusive use, benefit, and behoof" is held sufficient to create a separate use. Williams *v.* Avery, 38 Ala. 115. So, too, "for her own use and benefit, independent of any other person." Williams *v.* Maull, 20 Ala. 721; Ashcraft *v.* Little, 4 Ired. Eq. 236. So, too, "absolutely," in a suitable connection. Brown *v.* Johnson, 17 Ala. 232; Short *v.* Battle, 52 Ala. 456. So, too, "to be for her own and her family's use during her natural life." Heck *v.* Clippenger, 5 Penn. St. 385; Hamilton *v.* Bishop, 8 Yerg. 33. Or, "for the use and benefit of the wife and her heirs." Good *v.* Harris, 2 Ired. Eq. 630. Or, "not to be sold, bartered, or traded by the husband." Woodrum *v.* Kirkpatrick, 2 Swan, 218; Clarke *v.* Windham, 12 Ala. 798.

On the other hand, there is authority against permitting such expressions as these to create the separate use: "For the use and benefit of." Clevestine's Appeal, 15 Penn. St. 499; Fears *v.* Brooks, 12 Ga. 198; Tennant *v.* Stoney, 1 Rich. Eq. 222; Prout *v.* Roby, 15 Wall. 471; Merrill *v.* Bullock, 105 Mass. 486; Guishaber *v.* Hairman, 2 Bush, 320. Or, to the wife "in her own right," as in the English cases. *Ib. supra*, § 105. Or, "for the joint use of husband and wife." Geyer *v.* Branch Bank, 21 Ala. 414. Cf. Charles *v.* Coker, 2 S. C. N. S. 122. See *post*, ch. 14, as to conveyances to husband and wife. Or, "to her and the heirs of her body and to them alone," and similar expressions. Clevestine's Appeal, 15 Penn. St. 499; Bryan *v.* Duncan, 11 Ga. 67; Foster *v.* Kerr, 4 Rich. Eq. 390. Or where, instead of restraint of husband's right of disposition, is stated a mere exemption from liability for his debts. Harris *v.* Harbeson, 9 Bush, 397; Gillespie *v.* Burlinson, 28 Ala. 551. But see Young *v.* Young, 3 Jones Eq. 266. Or, to some one's wife, without further exclusive description. Moore *v.* Jones, 13 Ala. 296; Fitch *v.* Ayer, 2 Conn. 143; Shirley *v.* Shirley, 9 Paige, 364.

But the words, to the wife's "sole and separate use," are most commonly applied. Or, "solely for her own use." See last c., § 105. Or, "for the sole use and benefit of." Schoul. Hus. & Wife, §§ 226, 227, and cases cited.

[1] Good *v.* Harris, 2 Ired. Eq. 630; Hamilton *v.* Bishop, 8 Yerg. 33; Anderson *v.* Brooks, 11 Ala. 953.

[2] Beaufort *v.* Collier, 6 Humph. 487;

On the whole, it is apparent that there is much contrariety in the decisions, so far as relates to technical expression. Courts of equity, as such, will not deprive the husband of his legal rights upon any doubtful construction of language.[1] But the question relates rather to intention, to substance, and not literal expression; and any language is now deemed usually sufficient, whatever the technical words, which clearly expresses the intent to create a separate estate for the wife, independently of her husband's control.[2]

In the courts of this country, moreover, the statute policy is found to supplement equity. As a general rule an equitable trust by instrument requires the construction of that instrument to operate. But this does not necessarily conclude the wife. For, while an equitable separate estate is created, where the intent to exclude the marital rights of the husband clearly and unequivocally appears from the force and certainty of the terms employed, the local statute may intervene where the intent is doubtful, equivocal, or open to speculation, and fix the character of the estate as the wife's separate statutory and legal estate.[3] On the other hand, a conveyance or trust duly created for a married woman's separate benefit and duly expressed, is to be regarded as her equitable rather than her statutory estate.[4]

§ 125. **Equity Doctrine; Acquisition by Contract; Produce and Income.** —A married woman cannot by contract acquire any property to her separate use; but the benefit of her contract, if any, enures to her husband.[5]

The savings of the interest arising from the separate estate of a married woman are as much separate property as the principal, unless she has suffered them to pass under her husband's marital control. And property purchased with such

O'Kill *v.* Campbell, 3 Green Ch. 13; Ordway *v.* Bright, 7 Heisk. 681.

[1] Buck *v.* Wroten, 24 Gratt. 250; Bowen *v.* Sebree, 2 Bush, 112.

[2] See Prout *v.* Roby, 15 Wall. 471; Gaines *v.* Poor, 3 Met. (Ky.) 503.

[3] Short *v.* Battle, 52 Ala. 456.

[4] Pepper *v.* Lee, 53 Ala. 33; Musson *v.* Trigg, 51 Miss. 172. As to the creation of parol trusts for separate use, see Schoul. Hus. & Wife, § 228; Porter *v.* Bank of Rutland, 19 Vt. 410; Spaulding *v.* Day, 10 Allen, 96; Watson *v.* Broaddus, 6 Bush, 328.

[5] Lansier *v.* Ross, 1 Dev. & Bat. Eq. 39. But see Pinney *v.* Fellows, 15 Vt. 525; Schoul. Hus. & Wife, § 250.

savings belongs to her and continues subject to the same rules.[1] But furniture purchased by the wife with the income of her separate estate, and mixed with the furniture of the husband, becomes presumably the property of the husband, unless it was understood between them, at the time of the purchase, that the property should be kept by him as her trustee merely;[2] for it is both natural and proper that the wife should bestow her income so as to follow the common-law rule, thus helping to defray the family expenses and maintain the household establishment.

§ 126. **Equity Doctrine; Preserving Identity of Fund.** — Indeed, as to mingled funds generally, the rule applies that equity will not interfere where a fund set apart for the wife's sole benefit has become mixed with other funds beyond the possibility of identification.[3] But, on the other hand, the proceeds of a transfer of the wife's separate property, which it is understood shall be the wife's, may be followed by her in equity, provided she can trace the identity, and has acted consistently with her claim of title, even though the husband takes the title in himself.[4] A distinction may sometimes be requisite between the case where a wife asserts her equitable title against her husband, and that where her title is claimed against *bona fide* purchasers from the husband, having neither actual nor constructive notice of her title.[5]

§ 127. **Equity Doctrine; Separate Use only in Married State; How Ambulatory.** — In the United States, as in England, the separate estate in equity continues only during the marriage state, with probably similar qualifications.[6] The husband surviving his wife has the same rights in her separate estate as in her other property, even though another be appointed administrator.[7] The estate of the trustee, as such, terminates on the wife's death.[8] And yet if the husband, on survivor-

[1] Merritt *v.* Lyon, 3 Barb. 110; Hort *v.* Sorrell, 11 Ala. 386. See Kee *v.* Vasser, 2 Ired. Eq. 553. See *supra*, § 106.

[2] Shirley *v.* Shirley, 9 Paige, 363.

[3] Buck *v.* Ashbrook, 59 Mo. 200.

[4] Dula *v.* Young, 70 N. C. 450; Haden *v.* Ivey, 51 Ala. 381.

[5] See *supra*, § 108.

[6] *Supra*, § 107.

[7] Spann *v.* Jennings, 1 Hill Ch. 325; Good *v.* Harris, 2 Ired. Eq. 630; McKay *v* Allen, 6 Yerg. 44. And see Cooney *v.* Woodburn, 33 Md. 320, where wife left no issue surviving.

[8] Bercy *v.* Lavretta, 63 Ala. 374.

ship, is entitled to his wife's separate personal estate by virtue of his marital rights, he must, in order to obtain it from others, and have a firm title against creditors, take out letters of administration, as American cases hold, — at least where antenuptial debts of the wife have not been recovered during marriage.[1]

Consistently with its intent, the separate use may have an ambulatory operation, as under the English rule, ceasing when the wife becomes a widow, and, if left undisposed of, reviving, supposing she marries again.[2] Where the trust for a wife's sole benefit is expressed to be free from the control of "any present or future husband," equity will not set the trust aside on the death of a husband.[3] But it is held in this country that if a married woman having a separate estate survives her husband, the restraints upon the disposal of the estate, inconsistent with its general character, cease with the coverture.[4]

§ 128. **Equity Doctrine; Whether Marital Obligations Affected.** — The English doctrine that the wife's separate estate is not necessarily liable for her own general or antenuptial debts is also admitted here.[5] Nor, in the absence of an intention on the wife's part to make such estate liable, can it be subjected to her general debts contracted during coverture.[6] And in general the husband's obligation to maintain his wife and family remains unaffected by the fact that the wife holds separate property.[7]

§ 129. **Equity Doctrine; Restraint upon Anticipation.** — American courts have seldom to consider clauses of restraint

[1] McKay *v.* Allen, 6 Yerg. 44; Schoul. Hus. & Wife, § 233.

[2] *Supra*, § 107.

[3] O'Kill *v.* Campbell, 3 Green Ch. 13.

[4] Smith *v.* Starr, 3 Whart. 62; Pooley *v.* Webb, 3 Cold. 599; Thomas *v.* Harkness, 13 Bush, 23. See Perry Trusts, § 652; Schoul. Hus. & Wife, § 234. For a peculiarity in the Pennsylvania rule as to contemplation of future marriage, in such trusts, see Schoul. Hus. & Wife, § 234; Snyder's Appeal, 92 Penn. St. 504; Bercy *v.* Lavretta, 63 Ala 374.

[5] Vanderheyden *v.* Mallory, 1 Comst. 452.

[6] Knox *v.* Picket, 4 Desaus. 92; Gee *v.* Gee, 2 Dev. & Bat. 103; Haygood *v.* Harris, 10 Ala. 291; Curtis *v.* Engel, 2 Sandf. Ch. 287. But a disposition to overthrow this harsh rule appears in some States. Schoul. Hus. & Wife, § 235; Dickson *v.* Miller, 11 S. & M. 594.

[7] Meth. Ep. Church *v.* Jaques, 1 Johns. Ch. 450.

against anticipation or alienation,[1] a subject to which English chancery courts have devoted so much attention. Restraining a wife's power to deal with her separate property seems, in American policy, too much like denying her a separate property. Yet there are good grounds for such constraint; and in various instances our State courts find occasion to recognize such clauses.[2] The restraint is held, as in England, to apply equally to real or personal property, and to estates in fee or for life. It will come into operation, like the separate use to which it is attached, where a woman marries; but it exists only in the marriage state, since one *sui juris* is unrestrainable by any such means from exercising the ordinary rights of ownership, whether widow or maiden.[3]

CHAPTER X.

THE WIFE'S DOMINION OVER HER EQUITABLE SEPARATE PROPERTY.

§ 130. **General Principle of Wife's Dominion.** — The right to enjoy property carries with it, universally, as a necessary incident, the right of its free disposal. All other things, then, being equal, we shall expect to find that married women, when allowed to hold estate to their separate use, are permitted to sell, convey, give, grant, bargain, or otherwise dispose of it; and further, to encumber it with their debts as they please. Public policy may, however, restrain their dominion. Our present discussion relates to the wife's dominion over her equitable separate property. The wife's dominion over statutory separate property, or that held under

[1] *Supra*, § 110.

[2] Freeman *v.* Flood, 16 Ga. 528; *dicta* in Wilburn *v.* McCalley, 63 Ala. 436; Burnett *v.* Hawpe, 25 Gratt. 481.

[3] Wells *v.* McCall, 64 Penn. St. 207; Parker *v.* Converse, 5 Gray, 336.

There must be a clear and unequivocal expression of intent to restrain the *jus disponendi*. A declaration that the property shall not be liable for her debts, &c., is insufficient. Witsell *v.* Charleston, 7 S. C. 88; Radford *v.* Carwile, 13 W. Va. 572.

our married women's acts, will be reserved for the chapter succeeding.

§ 131. **Wife, unless restrained, has Full Power to dispose.** — The clause of restraint upon anticipation or alienation, and its important effect upon the wife's power of disposal, we have already dwelt upon. Apart from this, in England, it is the general rule, so far at least as concerns personal property, that from the moment the wife takes the property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it; for, upon being once permitted to take personal property to her separate use as a *feme sole*, she takes it with all its privileges and incidents, including the *jus disponendi*.[1] And while she may be restrained by language of the instrument under which her title is acquired, amounting to a clause restraining anticipation, for instance, yet the intention to restrain her must be clearly expressed; or else she may deal with the property as she pleases, either by acts *inter vivos*, or by testamentary disposition.[2] Her power of disposition is not confined to interests vested in possession, but extends to reversionary interests settled to her separate use.[3]

§ 132. **Same Principle applies to Income.** — The same principle applies to the income and profits and rents of the wife's separate property. The wife has the same control over her savings out of her separate estate as over the separate estate itself; "for," to use the somewhat involved metaphor of Lord Keeper Cowper, so often quoted, "the sprout is to savor of the root, and to go the same way."[4] Following this general doctrine, the wife, if unrestricted by the terms of the trust, may anticipate and encumber rents settled apart for her sep-

[1] Fettiplace *v.* Gorges, 1 Ves. Jr. 48; 3 Bro. C. C. 9; Peachey Mar. Settl. 261, 262. See 20 & 21 Vict. c. 57, the "reversionary act."

[2] Rich *v.* Cockell, 9 Ves. 369; Moore *v.* Morris, 4 Drew. 38; Darkin *v.* Darkin, 17 Beav. 581; Caton *v.* Rideout, 1 Mac. & Gord. 601.

[3] 2 Bright Hus. & Wife, 222; Macq. Hus. & Wife, 295; Sturgis *v.* Corp, 13 Ves. 192; Headen *v.* Rosher, 1 M'Cl. & Y. 89; Donne *v.* Hart, 2 Russ. & M. 360.

[4] Gore *v.* Knight, 2 Vern. 535; s. c. Prec. in Ch. 255. See also Messenger *v.* Clarke, 5 Exch. 392; Peachey Mar. Settl. 262; Newlands *v.* Paynter, 10 Sim. 377; s. c. on appeal, 4 M. & Cr. 408; Humphery *v.* Richards, 2 Jur. N. S. 432.

arate use.[1] But where the trust, by suitable expression, restrains the wife from anticipation, permitting her only to receive the income from her trustee from time to time as it falls due, she cannot anticipate and encumber her income.[2]

§ 133. **Technical Difficulties as to disposing of Real Estate.** — Where the wife's separate property consists of real estate, her power of disposition is affected by technical difficulties as to the method of executing conveyances.[3] But it has been suggested in England that, according to the principle of modern equity cases, the heir ought to be treated as a trustee, in case the wife had conveyed her beneficial interest by deed executed by herself alone, and that thus her sole conveyance would be allowed to operate.[4] In most parts of the United States a married woman can only dispose of her real estate, whether legal or equitable, by a conveyance according to statute, which the husband executes in token of assent; a partial reason for this being that the husband has his rights of curtesy even in lands settled to his wife's separate use.[5] Rents and profits of her separate land, or an annuity charged upon land, follow the more liberal rule of personal property held as her separate estate,[6] unless afterwards converted into land.[7]

§ 134. **Liability of Separate Estate on Wife's Engagements; English Doctrine.** — As a corollary to our proposition, the wife

[1] Cheever *v.* Wilson, 9 Wall. 108.

[2] Chancellor Kent, in Jaques *v.* Methodist Episcopal Church, 3 Johns. Ch. 77.

[3] 2 Roper Hus. & Wife, 182; 1 Bright Hus. & Wife, 224. See *Ex parte* Ann Shirley, 5 Bing. 226, cited in Macq. Hus. & Wife, 296. See also Peachey Mar. Settl. 267; Harris *v.* Mott, 14 Beav. 169.

[4] Macq. Hus. & Wife, 296, 297; 2 Story Eq. Juris. § 1390, and cases cited; 3 Sugd. V. & P. App. 62; Newcomen *v.* Hassard, 4 Ir. Ch. 274; Burnaby *v.* Griffin, 3 Ves. 266; Peachey Mar. Settl. 268. The statute referred to as raising technical difficulties in real estate is 3 & 4 Will. IV. c. 74.

[5] Shipp *v.* Bowmar, 5 B. Mon. 163; Radford *v.* Carwile, 13 W. Va. 572; 2 Perry Trusts, § 656; *supra*, §§ 94–97; McChesney *v.* Brown, 25 Gratt. 393; Koltenback *v.* Cracraft, 36 Ohio St. 584; Miller *v.* Albertson, 73 Ind. 343. But in New York, by way of an appointment, a married woman may convey such interests without the joinder of her husband. Albany Fire Ins. Co. *v.* Bay, 4 Comst. 9. See Armstrong *v.* Ross, 5 C. E. Green, 109.

[6] Cheever *v.* Wilson, 9 Wall. 108; Vizoneau *v.* Pegram, 2 Leigh, 183; Major *v.* Lansley, 2 R. & M. 355.

[7] McChesney *v.* Brown, 25 Gratt. 393.

may enter into contract with reference to her separate property somewhat as a *feme sole*. Formerly it was otherwise; and for a long period the English courts of equity refused to married women having separate estate the power to contract debts.[1] But the unfairness of permitting a wife to hold and enjoy her separate property after she had incurred debts specifically upon the faith of it soon became evident, as well as the inconvenience she suffered in being unable to find credit where she meant to deal fairly. So the courts felt compelled, after a while, to admit that she might in equity charge her separate estate by a written instrument, executed with a certain degree of formality, such as a bond under her hand and seal.[2] One precedent in the right direction leads to another, and soon less formal instruments were brought, one after another, under this rule; promissory notes, bills of exchange, and lastly written instruments in general.[3] Even here the court could not safely intrench itself; for the inconsistency of drawing distinctions between the different sorts of engagements of a married woman having separate estate could be readily shown; but it made a halt. The doctrine of an equitable appointment was alleged to support the new distinction.[4] Sound reasoning at last proved too strong an antagonist; this position was abandoned; and it became at length the settled doctrine of the equity courts of England that the engagements and contracts of a married woman, whether general or relating specifically to her separate property, are to be regarded as constituting debts, and that her property so held is liable to the payment of them, whether the contract be expressed in writing or not; and all the more so if she lives apart from her husband, and the debt could only be

[1] Vaughan *v.* Vanderstegen, 2 Drew. 180; Peachey Mar. Settl. 269; Newcomen *v.* Hassard, 4 Ir. Ch. 274.

[2] Biscoe *v.* Kennedy, 1 Bro. C. C. 17; Hulme *v.* Tenant, 1 Bro. C. C. 16; Norton *v.* Turvill, 2 P. Wms. 144; Tullett *v.* Armstrong, 4 Beav. 323.

[3] See Murray *v.* Barlee, per Lord Brougham, 3 Myl. & K. 210; Bullpin *v.* Clarke, 17 Ves. 365; Stuart *v.* Lord Kirkwall, 3 Madd. 387; Master *v.* Fuller, 1 Ves. Jr. 513; Gaston *v.* Frankum, 2 De G. & Sm. 561; s. c. on appeal, 16 Jur. 507; Peachey Mar. Settl. 270, and cases cited; Tullett *v.* Armstrong, 4 Beav. 323; Owen *v.* Homan, 4 H. L. Cas. 997. Taking a lease and agreeing to pay rent comes within the rule. Gaston *v.* Frankum, *supra*.

[4] Field *v.* Sowle, 4 Russ. 112.

satisfied from her separate property.[1] "Inasmuch as her creditors have not the means at law of compelling payment of those debts," says Lord Cottenham, "a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."[2]

But while the contract for payment of money made by a married woman having separate estate creates a debt, it is, practically considered, only a debt *sub modo*, when compared with the debt of a man or an unmarried woman. It cannot be enforced against her at law; and Lord Cottenham's language indicates that it is enforceable in equity, not on the ground that she incurred a personal obligation, but because there is property upon which the obligation may be fastened. Hence it is said that there can in no case be a decree against a married woman *in personam;* the proceedings are simply against her separate property *in rem*.[3] And though she is a necessary party to a suit to enforce payment against her separate estate, yet, if that estate be held in trust for her separate use, the suit must be against the trustees in whom that property is vested; the decree in such case being rendered, not against her, but against the trustees, to compel payment from her separate estate. Moreover, if the wife survive her husband, although the creditors may still enforce their demand in equity against her separate estate, yet her person and her general property remain as completely exempted from liability at law and in equity as in other cases of debts contracted by her during coverture.[4]

[1] Peachey Mar. Settl. 271, 272, and cases cited; Vaughan *v.* Vanderstegen, 2 Drew. 184; Owens *v.* Dickenson, Craig & Phil. 48; Macq. Hus. & Wife, 303; Picard *v.* Hine, L. R. 5 Ch. 274. But see Newcomen *v.* Hassard, 4 Ir. Ch. 274; 1 Sugd. Pow. 206, 7th ed.

[2] Owens *v.* Dickenson, Craig & Phil. 48.

[3] Hulme *v.* Tenant, 1 Bro. C. C. 16; Ashton *v.* Aylett, 1 Myl. & Cr. 111; Macq. Hus. & Wife, 304; Peachey Mar. Settl. 273. But see Keogh *v.* Cathcart, 11 Ir. Ch. 285.

[4] Vaughan *v.* Vanderstegen, 2 Drew. 184; Peachey Mar. Settl. 273; Macq. Hus. & Wife, 304. But her promissory note, given during coverture so as to bind her separate estate, is a good consideration for another promissory note, given after her husband's death, for a balance then due, though the former note be barred by the statute of limitations. Latouche *v.* Latouche, 3 Hurl. & Colt. 576.

Here, however, the fictions of equity create a new practical difficulty. For if the wife be a *feme sole* at all, with reference to her separate property, must she not have power to bind herself personally? In *Stead* v. *Nelson* a husband and wife undertook, for valuable consideration, by writing under their hands, to execute a mortgage of her separate estate. The husband died. Lord Langdale held that the surviving wife was bound by the agreement, and ordered a specific performance.[1] Certainly the ground of this decision must have been that the obligation was not upon her property alone, but upon her person. At the same time it is readily admitted that there are reasons of policy why the wife should be exempted from personal execution during coverture. This latter view accords with the common-law practice in analogous cases.[2] Perhaps, then, the more consistent view of the subject would be that the wife incurs a personal obligation, morally and legally, on such contracts, express or implied, as she may make during coverture with reference to her separate property; but that the general disabilities of coverture interpose obstacles to the enforcement of remedies by a creditor, which obstacles the courts of equity feel bound to regard; and hence that they confine the remedies to her separate estate, upon the faith of which, it may reasonably be presumed, the creditor chose to rely. And this conclusion is that preferred on the whole by the courts.[3]

As a general rule, in England, it became settled, therefore, that wherever a married woman, having property settled to her separate use, enters into any contract by which it clearly appears that she intends to create a debt as against herself personally, it will be assumed that she intended that the money should be paid out of the only property by which she could fulfil the engagement.[4]

A married woman, having separate estate, without a clause restraining her right of disposition, might charge and encum-

[1] 2 Beav. 245; Macq. Hus. & Wife, 304.

[2] Sparkes *v.* Bell, 8 B. & C. 1.

[3] 2 Perry Trusts, §§ 655–663; Lewin Trusts, 5th Eng. ed. 542, 543. The doctrine of equitable appointment seems to be exploded. Lord Justice Turner in Johnson *v.* Gallagher, 3 De G. F. & J. 494; *supra*, p. 193.

[4] Earl *v.* Ferris, 19 Beav. 69.

ber it in any manner she chose, either as security for her husband's debts, her own, or those of a stranger; provided she did not appear to have been imposed upon in the transaction.[1] A married woman might bind the *corpus* of her separate property by her compromise of a suit which she had instituted by her next friend.[2] She might also contract for the purchase of an estate, and, even though the contract made no reference to her separate property, it was bound by her agreement.[3]

§ 135. **The Same Subject; Latest English Doctrine.** — But in the latest English decisions a new turn — and that towards the better protection of wives having separate property against their own imprudent disposition thereof — is indicated, which we may attribute in some measure to the legislative changes concerning married women's rights, agitated on both sides of the ocean, and the influence of contemporaneous American equity decisions evoked by the prior legislation of our respective States upon the subject. In *Johnson* v. *Gallagher*, decided in 1861 by the English Court of Appeal in Chancery, the court checked the loose disposition to fastening liabilities of a married woman, no matter how improvidently incurred, upon her separate estate, on the mere faith of an implied engagement.[4] It would still appear that in England a married woman may, upon her separate credit, not only give her banker a lien for her overdrafts,[5] but employ a solicitor, or a surveyor, or a builder, or a tradesman, or hire laborers or servants, all on the credit or for the immediate benefit of her separate property;[6] and that her corporation shares are

[1] Clerk *v.* Laurie, 2 Hurl. & Nor. 199; Peachey Mar. Settl. 292. See Horner *v.* Wheelwright, 2 Jur. N.S. 367. The same rule applied in the United States. See *post*, § 137; Short *v.* Battle, 52 Ala. 456; Armstrong *v.* Ross, 5 C. E. Green, 109.

[2] Wilton *v.* Hill, 25 L. J. Eq. 156.

[3] Dowling *v.* Maguire, Lloyd & Goold, temp. Plunket, 1; Crofts *v.* Middleton, 2 Kay & Johns. 194, reversed on appeal. And see Schoul. Hus. & Wife, § 243.

[4] Johnson *v.* Gallagher, 3 De G. F. & J. 494. And see the prior English cases very fully cited in the opinion of Lord Justice Turner.

[5] London Bank of Australia *v.* Lempriere, L. R. 4 P. C. 572, 594.

[6] See Lord Justice James, in London Bank of Australia *v.* Lempriere, *supra;* Lord Justice Turner, in Johnson *v.* Gallagher, 3 De G. F. & J. 494.

liable to assessment.[1] Where a married woman contracts any such debt which she can only satisfy out of her separate estate, her separate estate will, in equity, be made liable to the debt.[2] Doubt is thrown, however, upon the extent of the binding force of engagements not for the wife's benefit; and, on the whole, the test in chancery seems to be settling, at the present day, towards regarding whether the transaction out of which the demand arose had reference to, or was for the benefit of, the wife's separate estate; and, on the whole, unsatisfactory as may be this abstruse discussion, circumstances are likely to determine the decision of each case, with perhaps a growing partiality in favor of a married woman's rights, and a growing indisposition to make her suffer.

§ 136. **Dominion and Liability of Wife's Separate Estate; American Doctrine.** — In this country, whenever the wife's separate use has been admitted as a doctrine of equity, independently of statute, her right of dominion has also been recognized. The celebrated New York case of *Jaques* v. *Methodist Episcopal Church*, which may justly be placed foremost among the very few important American chancery decisions of this class, established that a *feme covert*, with respect to her separate estate, and especially her personal property, was to be regarded in equity as a *feme sole*, so that she might dispose of it at pleasure, except so far as expressly denied or restrained by the terms of the instrument which created the trust.[3] Numerous American cases also rule, conformably with English precedents, that a married woman may, by her contracts or engagements, bind her separate property, it being sufficient that there was an intention to charge her separate estate; and further, that by contracting a debt during coverture she furnishes a presumption of that

[1] Matthewman's Case, L. R. 3 Eq. 787.

[2] Picard *v.* Hine, L. R. 5 Ch. App. 274.

[3] Jaques *v.* Methodist Episcopal Church, 17 Johns. 548; Methodist Episcopal Church *v.* Jaques, 1 Johns. Ch. 450; 3 *ib.* 77; 2 Kent Com. 164; McChesney *v.* Brown, 25 Gratt. 393; Patton *v.* Charlestown Bank, 12 W. Va. 587; Wells *v.* Thorman, 37 Conn. 319; Leaycraft *v.* Hedden, 3 Green Ch. 512; Fears *v.* Brooks, 12 Ga. 200; Bradford *v.* Greenway, 17 Ala. 805; Shipp *v.* Bowmar, 5 B. Mon. 163; Kirwin *v.* Weippert, 46 Mo. 532.

intention, since otherwise her contract must have been worthless to her creditor.[1] In general, however, it is to be observed that the American equity doctrine of the wife's power to charge her separate estate, independently of the married women's acts, has fluctuated somewhat, as have likewise the English cases, and that not only do American courts find difficulty, like those of England, in encountering cases where the liability incurred was disadvantageous to the wife, and at the same time not clearly charged by her upon her separate property; but this further source of perplexity appears moreover, namely, that local legislation, in these later years, places the rights of married women on quite a novel footing. Some States favor a stricter rule; in few States, indeed, did the subject receive much development prior to the second half of this century; while the policy of the married women's acts themselves, in most jurisdictions, must be opposed to making such legislation disadvantageous to her interests. Hence a course of precedents, of later years, hardly less abstruse and irreconcilable than those of the English chancery, but somewhat independent of them. This doctrine may better be studied at length in our next chapter, in connection with legislative changes affecting the wife's right of disposition in this country. To this extent, however, American courts occupy sure and uniform ground, namely, that while a married woman may not be bound personally by her contract, the rule under the statutes and independently of them[2] is, that when services are rendered her by her procurement, or she contracts a debt generally, on the credit and for the benefit of her separate estate, there is an implied agreement and obligation springing from the nature of the consideration, which the courts will enforce by charging the amount on her separate property as an equitable lien.[3]

In American chancery courts, in fact, the charging of the

[1] 2 Kent Com. 164, and cases cited; Schoul. Hus. & Wife, § 246.

[2] Wilson *v.* Jones, 46 Md. 349; Cozzens *v.* Whitney, 3 R. I. 79; Harshberger *v.* Algier, 31 Gratt. 52.

[3] Owen *v.* Cawley, 36 N. Y. 600; Ballin *v.* Dillaye, 37 N. Y. 35; Armstrong *v.* Ross, 5 C. E. Green, 109; Buckner *v.* Davis, 29 Ark. 444; Dale *v.* Robinson, 51 Vt. 20; Eliott *v.* Gower. 12 R. I. 79.

wife's separate estate by equity proceedings is presented with reference sometimes to her equitable, and sometimes to her statutory, separate estate. In some States the complete jurisdiction of trusts for separate use is the creature of recent statute ;[1] in others, the rule is deliberately admitted, in chancery, to differ as to statutory and equitable separate estate ;[2] in others, once more, chancery seeks, and with true consistency, to apply one and the same principle where it takes jurisdiction of separate estate at all. The discrepancy of all these modern American authorities relates chiefly, (1) to determining the liability of the wife's equitable or statutory separate estate for debts and engagements not beneficial to the wife herself, or to the estate, but, if at all, for her husband's or a stranger's benefit, and (2) to fixing the nature of the evidence of intention required for such charges. The equitable rule in the United States, more common prior to the married women's acts, appears to have been, that the wife's separate estate would be held liable for all debts which she, by implication or expressly, by writing or by parol, charged thereon, even if not contracted directly for the benefit of the estate.[3] But such is by no means the rule to-day.

§ 136 *a*. **Property with Power of Appointment.** — Property limited to such uses as a married woman shall appoint is not separate estate. There is a difference between property subject merely to her power of appointment, and property settled to her sole and separate use. In the former instance she may dispose of the estate by executing an instrument according to the strict letter of her authority. In the latter, she is invested with a beneficial interest and enjoyment, however restricted may be the dominion allowed her by the donee. A married woman may, however, be expressly authorized to appoint by will and not by deed, and the exercise of such power in favor of volunteers may render the appointed funds assets for the satisfaction of debts properly chargeable against

[1] See Hoar, J., in Willard *v.* Eastham, 15 Gray, 328.

[2] Musson *v.* Trigg, 51 Miss. 172; Robinson *v.* O'Neal, 56 Ala. 541.

[3] 2 Kent Com. 164; 2 Story Eq. Juris. §§ 1398, 1401, and cases cited; Ballin *v.* Dillaye, 37 N. Y. 35.

her separate estate.[1] In general, equity permits a married woman to dispose of property according to the mode, if any, prescribed by the instrument under which the separate use is created.[2]

§ 137. **Wife's Right to Bestow upon Husband, Bind for his Debts, &c.**— A married woman, save so far as she is restrained from anticipation by the terms of the trust, may bestow her separate property upon her husband by virtue of her right of disposal; although at common law no such thing is known as a gift between husband and wife. She may likewise transfer it to him for a valuable consideration.[3] But acts of this sort are very closely scrutinized; and undue influence on the part of the husband, or the fraud of both husband and wife upon creditors of either, will often explain the motive of such transactions, and suffice for setting them aside in equity.[4] The fact that the husband receives the capital of his wife's separate property raises the inference, not of a beneficial transfer to him, but of a transfer to him as her trustee.[5] A gift to him requires clear evidence, such as acts of dominion, or the use of the property for his business or to execute his marital obligations.[6]

So may the wife, unless specially restrained by the trust, bind her separate property for her husband's debts.[7] It is also well settled, both under the married women's acts of our respective States, and independently of them, that a married woman may execute a mortgage jointly with her husband to secure his debts, in which case she is to be regarded as his surety; and this applies to lands held in her right, whether conveyed to her separate use or not, provided the conveyance be executed

[1] *Re* Harvey, 28 W. R. 73.

[2] McChesney *v.* Brown, 25 Gratt. 393; Knowles *v.* Knowles, 86 Ill. 1; Jaques *v.* Methodist Episcopal Church, 17 Johns. 548; Schoul. Hus. & Wife, § 247.

[3] Lyn *v.* Ashton, 1 Russ. & M. 190; Macq. Hus. & Wife, 297; 2 Kent Com. 111; Charles *v.* Coker, 2 S. C. N. S. 123.

[4] Pybus *v.* Smith, 1 Ves. 189.

[5] Rich *v.* Cockell, 9 Ves. 360; Richardson *v.* Stodder, 100 Mass. 528.

[6] Shirley *v.* Shirley, 9 Paige, 363; Rowe *v.* Rowe, 12 Jur. 909. See further, Schoul. Hus. & Wife, § 248.

The wife's bond, executed to her husband, has been sustained in the English chancery. Heathey *v.* Thomas, 15 Ves. 596.

[7] Schoul. Hus. & Wife, §§ 249, 250; 2 Kent Com. 111, and cases cited; 2 U. S. Eq. Dig. Hus. & Wife, 18; Dallam *v.* Walpole, Pet. C. C. 116; Charles *v.* Coker, 2 S. C. N. S. 123.

by husband and wife jointly after the usual manner of such instruments under the statute, and no duress was imposed upon her.[1] And she may pledge her separate personal property as security in like manner.[2] And her separate estate will be bound by any debt properly contracted by her, even though her husband should be the creditor.[3] A gift or conveyance by a wife to her husband, if fraudulently or forcibly procured by him, will be set aside in equity upon her representation; so, too, where it was intended for his security, but taken out as absolute;[4] but if the rights of a *bona fide* purchaser without notice of the fraud or force have intervened, her own rights may be impeded in the latter's favor.[5]

§ 138. **Concurrence of Wife's Trustee, whether Essential.** — Consistently with the wife's right of dominion over her separate estate, the rule, both in English and American chancery courts, is, that the concurrence of the trustee of the fund is not essential to the validity of her disposition thereof.[6] On the contrary, if she has the absolute beneficial enjoyment of the fund by the terms of the trust (there being no clause in restriction of her power), or in such manner, if it be real estate, that the statute of uses would execute the title or use in her, she can compel the trustee to make immediate conveyance or transfer to her of the trust fund, and if they refuse they are liable to costs.[7] Even if the gift be to her husband or for his benefit, the trustee must transfer and give legal effect to the alienation, as in other instances of dis-

[1] Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Vartie *v.* Underwood, 18 Barb. 561; Bartlett *v.* Bartlett, 4 Allen, 440; Short *v.* Battle, 52 Ala. 456; Young *v.* Graff, 28 Ill. 20; Watson *v.* Thurber, 11 Mich. 457; Schoul. Hus. & Wife, § 249.

The method of conveying the wife's general lands under our modern local statutes is shown *supra*, §§ 94, 95.

[2] Witsell *v.* Charleston, 7 S. C. 88.

[3] Gardner *v.* Gardner, 7 Paige, 112.

[4] Stumpf *v.* Stumpf, 7 Mo. App. 272; Fargo *v.* Goodspeed, 87 Ill. 290.

[5] O'Hara *v.* Alexander, 56 Miss. 316. For English rule see also Schoul. Hus. & Wife, § 249; Dixon *v.* Dixon, L. R. 9 Ch. D. 587.

[6] Essex *v.* Atkins, 14 Ves. 552; Corgell *v.* Dunton, 7 Penn. St. 532; Jaques *v.* Methodist Episcopal Church, 17 Johns. 548.

[7] Clerk *v.* Laurie, 2 Hurl. & Nor. 199; Peachey Mar. Settl. 292; Schoul. Hus. & Wife, § 250; Taylor *v.* Glanville, 3 Mad. 179; North American Coal Co. *v.* Dyett, 7 Penn. St. 132; Gibson *v.* Walker, 20 N. Y. 476. And see Lewis *v.* Harris, 4 Met. (Ky.) 353. But see Noyes *v.* Blakeman, 2 Seld. 567; s. c. 3 Sandf. 531, as to the effect of New York statute relative to the declaration of trusts.

position on her part, reserving, of course, the right to show bad faith or undue influence affecting the validity of the transfer or conveyance, and so defeating it.[1]

But if, on the other hand, the instrument requires the written approval of the trustee expressed in a certain manner, that requirement must be complied with to make even the joint conveyance of husband and wife effectual;[2] and it is incumbent on every trustee to see that all restrictions on the wife's dominion over the fund are duly respected.[3]

§ 139. **Whether Wife must be specially restrained under the Trust.** — In absence of all technical clauses, our general rule is that the wife, unless specially restrained by the terms of the trust under which she acquired her equitable separate property, may dispose of it at pleasure. *Jaques* v. *Methodist Episcopal Church* went so far as to rule that, though a particular mode of disposition be specifically pointed out in the instrument, this will not preclude the wife from adopting any other mode of disposition, unless she has been, by express language of the trust, specially restrained to that particular mode.[4] In this latter doctrine Chancellor Kent (whose judgment in the lower court had been reversed[5]) did not concur, — adopting the more conservative view with reference to such restrictions. The distinction is rather a nice one, and successive American decisions in other States have generally sustained the Chancellor's views, which seem indeed most consonant to reason and the intent of such trusts; but the cases are, on the whole, conflicting, and not very conclusive.[6]

[1] Essex *v.* Atkins, 14 Ves. 542; Marrick *v.* Grice, 3 Nev. 52; Standford *v.* Marshall, 2 Atk. 69; Knowles *v.* Knowles, 86 Ill. 1.

[2] Gelston *v.* Frazier, 26 Md. 329.

[3] Hopkins *v.* Myall, 2 R. & M. 86; McClintic *v.* Ochiltree, 4 W. Va. 249. See Horner *v.* Wheelwright, 2 Jur. N. S. 367.

[4] Jaques *v.* Methodist Episcopal Church, 17 Johns. 548; Methodist Episcopal Church *v.* Jaques, 1 Johns. Ch. 450; 3 *ib.* 77.

[5] 3 Johns. Ch. 77. The point contended for by the Chancellor, but disapproved on appeal, was, that if a wife has power expressly conferred to dispose by deed in concurrence with her husband, or by will without it, her receipt "alone" to be a sufficient discharge as to rents, issues, and profits; the wife cannot appoint by deed, or charge the property by her sole bond, note, parol promise, &c.

Hoar, J., in Willard *v.* Eastham, 15 Gray, 328, appears to have misapprehended this point. See Schoul. Hus. & Wife, § 251.

[6] See Tullett *v.* Armstrong, 1 Beav. 1, at length, for the English doctrine.

Both English and American precedents agree in the converse principle, that if, by the terms of the trust, the wife is expressly restrained to a particular mode of dealing with the separate fund, she cannot, even by proceedings in equity, be enabled to pursue any other inconsistent mode.[1]

§ 140. **Wife's Participation in Breach of Trust with Husband or Trustee.** — The separate estate of married women may be affected, and their rights barred, by active participation in breaches of trust.[2] But on the other hand, to preclude the wife from the right to relief simply because she has improperly permitted her husband to receive the trust funds, would be to defeat the very purpose for which the trust was created, — namely, the protection of the wife against her husband. Hence, according to the latest and best authorities, the court must be satisfied that the husband has not in any degree influenced her acts and conduct, before it holds her separate estate to be affected; and this, upon the most jealous investigation.[3]

Where her husband and the trustee of the fund, by way of fraudulent collusion to deprive her of her property, make an improper transfer thereof out of her separate use, her assent will not be readily presumed to the transaction from circumstances, while she remained in ignorance of it.[4]

§ 141. **Income to Husband; One Year's Arrears.** — By the ordinary rule of the English chancery courts a wife is precluded from recovering the arrears of income on her separate estate for more than a year, upon the ground of a supposed gift to her husband.[5] As to whether one year's income can be recovered or not there is much discrepancy in the English

For American authorities, see 2 Kent. Com. 165, 166, and cases cited in last edition. Also Schoul. Hus. & Wife, § 252.

[1] Ross *v.* Ewer, 2 Atk. 156; Schoul. Hus. & Wife, §§ 237, 238, 247, 252.

[2] Peachey Mar. Settl. 276; Ryder *v.* Bickerton, 3 Swanst. 80, *n.*; Lord Montford *v.* Lord Cadogan, 19 Ves. 635.

[3] Per Sir George Turner, Hughes *v.* Wells, 9 Hare, 773. And see authorities cited, Schoul. Hus. & Wife, § 254; Carpenter *v.* Carpenter, 27 N. J. Eq. 502; Clive *v.* Carew, 1 John. & Hem. 199.

[4] Dixon *v.* Dixon, L. R. 9 Ch. D. 587.

[5] Peachey Mar. Settl. 291, and cases cited; Rowley *v.* Unwin, 2 Kay & Johns. 142; Arthur *v.* Arthur, 11 Ir. Ch. 513.

cases; but the better opinion, even here, is, that the husband has been allowed by the wife presumably to receive and appropriate her income from year to year, unless, by a consistent course of dissent, the wife, on her part, rebuts such presumption, in which case her will must be respected. If the wife is insane and incapable of assenting, or the income has not actually come to her husband's hands, and under the trust, moreover, the income is not payable to the husband, the income will belong to her; though here the inclination of equity is to allow the reasonable offsets to the husband.[1]

CHAPTER XI.

THE WIFE'S DOMINION OVER HER STATUTORY SEPARATE PROPERTY.

§ 142. **Dominion under Married Women's Acts in General.** — The doctrine of the wife's dominion over her separate estate is at this day more generally asserted, in the United States at least, with reference to the married women's acts; and some of the later cases show important variations from the equity rule, as we shall proceed to notice. The decided change seems to date, in American chancery, from the passage of the important married women's acts, or about 1848, and in most States at this day to affect equitable remedies with reference to both the statutory and equitable separate estate of the wife.[2]

§ 143. **New York Rule as to Wife's Charge not Beneficial.** — The obstinate case of *Yale* v. *Dederer* is an important one, as establishing in a leading American State, under cover of modern legislative policy, a new doctrine, at variance with that of English equity courts noted in our last chapter, and apparently contrary to its own precedents.[3] In this case the New York statutes of 1848 and 1849 were to be construed,

[1] Lewin Trusts, 559; 2 Perry Trusts, § 665, and cases cited.

[2] *Supra*, § 134.

[3] Yale *v.* Dederer, 18 N. Y. 265; s. c. 22 N. Y. 450.

which in terms permitted the wife to hold to separate use, and to "convey and devise" as if sole, but left her promissory note as void as it always had been at the common law.[1] A question properly raised was whether, notwithstanding her legal disabilities to contract remained substantially as before the statute, the married woman might, as incidental to the complete right of property and *jus disponendi* which she took under the statute, charge her estate for the purposes and to the extent which rules of equity had heretofore sanctioned with reference to her equitable separate estate. The decision was adverse, and the principle of the decision was this: that, in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or else the consideration must be obtained for the direct benefit of the estate itself. Later New York decisions follow the rule of this case, and require a distinct written obligation to bind the wife where the debt is not contracted for the direct benefit of the estate.[2]

[1] It appeared that the husband had offered his promissory note to the plaintiff in payment for certain cows which he wished to purchase; that the plaintiff, doubting his solvency, required him to procure his wife to unite in a note with him. This he did. The note was subsequently renewed. At the time of signing the note Mrs. Dederer remarked that if her husband was not able to pay it, she was. The husband turned out insolvent afterwards, and judgment on the note was returned *nulla bona* as against him. It was established that the wife had sufficient real estate, held in her own right, to satisfy the claim; and the judge, who heard the evidence, stated in his finding that "the defendant, Mrs. Dederer, intended to charge, and did expressly charge, her separate estate for the payment of the note." The Court of Appeals nevertheless held that Mrs. Dederer was a mere surety for her husband; and that being such, although it was her intention to charge her separate estate, such intention did not take effect. We may add that Yale *v.* Dederer was passed upon by the New York Court of Appeals three several times. After the first appeal, 18 N. Y. 265, the court below, which would at first have entered judgment to sell, found that the wife actually intended to charge her separate estate with the promissory note in question. Hence the principle so broadly asserted as to evidence in writing on the second appeal (22 N. Y. 450); Selden, J., observing that hereafter married women were not to be indebted to equity merely for protection in their separate estate. A third time (see 68 N. Y. 329), or about 1877, the case went up on appeal; the effort upon the last trial being made to take the case out of the rule by evidence, but it was held that the findings as to the circumstances and intent were not inconsistent with the idea that the defendant had signed as surety.

[2] White *v.* McNett, 33 N. Y. 371; Ledlie *v.* Vrooman, 41 Barb. 109;

The decision in *Yale* v. *Dederer*, on its second appeal, made a profound impression among chancery jurists, the novelty of the married women's act favoring this result, and likewise the circumstance that chancery jurisdiction had hitherto been taken more liberally in New York than in other States in the Union. Opinions differed as to the merits of the decision, but not as to the boldness of the innovation upon chancery precedents. It does not appear that this doctrine has found favor in all the other States. In Wisconsin, the decision of *Yale* v. *Dederer* was unsparingly condemned soon after, in the course of judicial discussion.[1] And for several years the more common equitable rule in this country still seemed to be that the wife's separate estate would be held liable for all debts which she by implication or expressly, by writing or parol, charged thereon, even if not contracted directly for the benefit of the estate.[2] For the wife's debts are charged in justice upon her separate estate, not because of her power to make a valid written or verbal contract, but because it is right that her debts should be paid.[3]

But influences were at work to bring other jurisdictions to reject the loose discretionary powers which English precedents appeared to have established against, as well as favorably to, the interests of married women. In Massachusetts, at a term of 1860, the Supreme Court, called for the first time to exercise full equity powers under a statute then recent, followed the rule of *Yale* v. *Dederer*, in a similar case of married women's suretyship.[4] The English chancery itself, finding occasion in 1861 to consider the subject of separate estate

White *v.* Story, 43 Barb. 124; Merchants' Bank *v.* Scott, 59 Barb. 641.

[1] Todd *v.* Lee, 15 Wis. 365.

[2] Pentz *v.* Simonson, 2 Beasl. 232; Grapengether *v.* Fejervary, 9 Iowa, 163; Rogers *v.* Ward, 8 Allen, 387; Mayo *v.* Hutchinson, 57 Me. 546; Major *v.* Symmes, 19 Ind. 117; Oakley *v.* Pound, 1 McCart. 178; Miller *v.* Newton, 23 Cal. 554; 2 Kent Com. 164; 2 Story Eq. Juris. §§ 1398, 1401. See Koontz *v.* Nabb, 16 Md. 549; Knox *v.* Jordan, 5 Jones Eq. 175; McFaddin *v.* Crumpler, 20 Tex. 374; Phillips *v.* Graves, 20 Ohio St. 371; Avery *v.* Vansickle, 35 Ohio St. 270.

[3] Cummins *v.* Sharpe, 21 Ind. 331; Pentz *v.* Simonson, 2 Beasl. 232; Glass *v.* Warwick, 40 Penn. St. 140. But see Maclay *v.* Love, 25 Cal. 367; Hanly *v.* Downing, 4 Met. (Ky.) 95.

[4] Willard *v.* Eastham, 15 Gray, 328. The volume of Reports containing this opinion was not, however, published before 1869.

liability for a wife's unbeneficial dealings,[1] showed a new inclination to discriminate for the protection of a wife's separate estate in such instances. On the whole, therefore, while the lines of American and English decisions of late do not run parallel, and States themselves are discordant as to burden of proof and as to admitting or denying the New York and Massachusetts doctrine, — some States holding it immaterial in equity whether the wife's debt be evidenced by a written instrument or parol promise,[2] — the tendency on both sides of the water is towards the conclusion that the debts of a married woman having separate property are only to be surely charged by a court of equity upon that separate property, and payment enforced out of it, when it was contracted by her for its benefit, or expressly made a charge thereon or expressly contracted on its credit;[3] and, of course, to the extent only to which the wife's power of disposal may go.[4]

§ 144. **Combined Tests; Benefit and Express Intention.** — The equitable rule in which American cases, together with the latest English cases,[5] generally agree, whether with reference to the equitable or statutory separate property of the wife, is, that the separate estate of a married woman becomes

[1] That is, for buying stock in trade for her separate business. This case was Johnson *v.* Gallagher, 3 De G. F. & J. 494; *supra*, § 135.

[2] Miller *v.* Brown, 47 Mo. 505.

[3] See *supra*, § 135; Armstrong *v.* Ross, 5 C. E. Green, 109; Kantrowitz *v.* Prather, 31 Ind. 92; Hasheagan *v.* Specker, 36 Ind. 413; Perkins *v.* Elliott, 7 C. E. Green, 127; Patrick *v.* Littell, 36 Ohio St. 79, and authorities cited; Westgate *v.* Munroe, 100 Mass. 227; Nash *v.* Mitchell, 71 N. Y. 199; Wilson *v.* Jones, 46 Md. 349, Wallace *v.* Finberg, 46 Tex. 35; Williams *v.* Hugunin, 69 Ill. 214; Stilwell *v.* Adams, 29 Ark. 346; Pippen *v.* Wesson, 74 N. C. 437.

The doctrine of Yale *v.* Dederer, whether by statute or judicial decision, finds more direct support from Cozzens *v.* Whitney, 3 R. I. 79; Jones *v.* Crosthwaite, 17 Iowa, 393; Perkins *v.* Elliott, 7 C. E. Green, 127; Maguire *v.* Maguire, 3 Mo. App. 458; Hodson *v.* Davis, 43 Ind. 258; Chatterton *v.* Young, 2 Tenn. Ch. 768; Nelson *v.* Miller, 52 Miss. 410. But other cases are to the contrary. Metropolitan Bank *v.* Taylor, 62 Mo. 338; Mayo *v.* Hutchinson, 57 Me. 546; *supra*, p. 206. The rule is regarded as settled in New York, that, in order to charge the estate of a married woman with a debt not contracted for the benefit of her separate estate, the intent to charge such estate, where the obligation is in writing, must be expressed in the instrument. Yale *v.* Dederer, 68 N. Y. 329.

[4] See Hix *v.* Gosling, 1 Lea, 560. For numerous applications of this new rule, see Schoul. Hus. & Wife, § 258, and cases cited.

[5] *Supra*, § 135.

chargeable with the due performance of her engagements or obligations made or incurred upon its express credit or for its benefit.[1] Benefit is not the sole test; but, to the extent of her power of disposition over her separate estate, the wife may charge it with such engagements as she sees fit to make, provided the evidence of intention be satisfactory (upon which point States differ), and provided, of course, that the transaction was voluntary on her part, and not fraudulently procured.

In order to charge the separate estate of a married woman with a debt, as the cases now to be examined will show, a specific agreement to that effect is not indispensable; but the intent, or the creditor's right to procure such charge, may be inferred from the surrounding circumstances.[2]

§ 145. **Whether Wife may Bind as Surety or Guarantor.** — Where a married woman having separate estate executes a promissory note as surety for another, such estate is presumably charged with its payment in Ohio, Maine, Missouri, and some other States. But the rule, as we have seen, is (or was lately) otherwise in New York, and Massachusetts, and New Jersey, and the same may be said as to Georgia, Tennessee, Nebraska, and other States. In Louisiana a married woman may bind herself as surety for any one except her husband.[3]

A married woman's promissory note does not, as a rule, secure her husband's debts, nor does she, by executing it, bind herself lawfully as his surety or guarantor on a contract not relating to her separate estate, nor for its benefit, so as to render herself liable to suit.[4] The same may be said, though perhaps with more reserve, of her undertakings for the benefit of third parties; as a mere accommodation indorser, for instance.[5] The tendency of some of the late cases is to ex-

[1] Patrick *v.* Littell, 36 Ohio St. 79.

[2] Conlin *v.* Cantrell, 64 N. Y. 217; Harshberger *v.* Alger, 31 Gratt. 52.

[3] Schoul. Hus. and Wife, § 260, and cases cited.

[4] Parker *v.* Simonds, 1 Allen, 258; Shannon *v.* Canney, 44 N. H. 592, and numerous cases cited in Schoul. Hus. & Wife, § 260.

[5] Shannon *v.* Canney, 44 N. H. 592; Crane *v.* Kelley, 7 Allen, 250; Kohn *v.* Russell, 91 Ill. 138; Bailey *v.* Pearson, 9 Fost. 77; Lytle's Appeal, 36 Penn. St. 131; Peake *v.* La Baw, 6 C. E. Green, 269; Bauer *v.* Bauer, 40 Mo. 61.

empt promissory notes which are drawn payable to a married woman or order from all liability for the husband's engagements; a presumption being thus afforded that the money is due to her and not to her husband.[1]

§ 146. **Inquiry into Consideration Pertinent; Promissory Note, Bond, &c.** — Inquiry into consideration is always pertinent under the equity rule, and in States where the wife is not invested with plenary power of legal disposition under appropriate statutes. This applies to the wife's promissory note, which, as the law stands, apart from statute, cannot be a safe investment for any one; for its value consists in the proof that it was a contract on her part, and a binding contract, relative to her separate property, within the general rule. Even in Massachusetts, where the wife's mortgage on real estate duly executed is upheld, a note secured by it,

[1] See Cowles *v.* Morgan, 34 Ala. 535; Lewis *v.* Harris, 4 Met. (Ky.) 353; Chapman *v.* Williams, 13 Gray, 416; Paine *v.* Hunt, 40 Barb. 75; Tooke *v.* Newman, 75 Ill. 215. Since the second decision in Yale *v.* Dederer, the New York statute of 1860 provides that any married woman possessed of real estate as her separate property may bargain, sell, and convey such property, and "enter into any contract" in reference to the same. By way of construing this statute, together with the prior acts of 1848 and 1849, the New York Court of Appeals has charged a married woman as party without consideration to a promissory note, where she added, as promisor or special indorser, express words charging the payment of the note on her separate property. Corn Exchange Ins. Co. *v.* Babcock, 42 N. Y. 613. She may therefore now become a surety or guarantor, by force of statute, not only in New York but in some other States, though the statute of frauds must apply to her oral promise to be liable for another. Woolsey *v.* Brown, 74 N. Y. 82; Hart *v.* Grigsby, 14 Bush, 542: Northwestern Life Ins. Co. *v.* Allis, 23 Minn. 337.

In New Jersey, on the other hand, where no such power was given under statute for the married woman to dispose of her separate property as has been conferred by the New York legislature, equity has refused to recognize any power in a married woman, independently of appropriate legislation, to charge her separate statutory estate by any writing, even though it contain words which show a clear intention to bind such estate, except by a mortgage acknowledged as required by law, or for debts contracted for the benefit of her separate estate, or for her own benefit on the credit of it; and hence it declines to impose a lien on the wife's separate estate because of her note as surety, even though by express words she charges the payment of that note on her separate property. Perkins *v.* Elliott, 7 C. E. Green, 127; Kohn *v.* Russell, 91 Ill. 138; Dunbar *v.* Mize, 53 Ga. 435. In other States the wife's capacity to make a contract of suretyship or gnaranty is still denied. Russel *v.* People's Savings Bank, 39 Mich. 671. And quite generally her simple indorsement of a bill or note is held to be inoperative beyond divesting her of a title therein. Moreau *v.* Branson, 37 Ind. 195.

if for unbeneficial consideration, such as the husband's indebtedness, could not be enforced.[1] But the latest legislation in Massachusetts does not require the consideration of a wife's contract to enure to her own benefit, and her joint note with her husband, or her indorsement, binds her to quite or nearly the same extent as that of any single woman.[2]

But whether by promissory note, bond, oral or written promise, the instrument and the proof, taken together, must disclose the intention[3] to charge her separate estate expressly, or else some beneficial object for which the money was raised. If a loan is made to the wife, the purpose of that loan must be established by the lender as the test of his right to recover.[4] So, too, if she gives a bond, whether as surety or otherwise,[5] or signs or indorses a promissory note.[6] And in some States, even in equity, as to her properly executed conveyance of real estate.[7] But, on the other hand, the general property rights of married women being now recognized by sundry statutes, their right in equity to make contracts affecting their property is no longer limited to property settled formally to a sole and separate use; and although in numerous instances statutory requisites for making the contract binding in law may be wanting, equity will bind her property, nevertheless, where she or her estate has received the benefit of the transaction.[8] We speak here with a constant reservation of *feme sole* liabilities acquired under local statutes which may affect all such issues.[9]

§ 147. **Equity charges Engagement on General as well as Specific Property.** — Equity will charge a debt, and even one

[1] Heburn *v.* Warner, 112 Mass. 271. And see Wright *v.* Dresser, 110 Mass. 51.

[2] Major *v.* Holmes, 124 Mass. 108; Kenworthy *v.* Sawyer, 125 Mass. 28; Goodnow *v.* Hill, 125 Mass. 587.

[3] The presumption is that a contract entered into by a married woman having a separate estate, for its benefit or for her exclusive benefit, was contracted upon the credit of her estate. Williams *v.* King, 43 Conn. 569.

[4] Way *v.* Peck, 47 Conn. 23; Viser *v.* Scruggs, 49 Miss. 705.

[5] Gosman *v.* Cruger, 69 N. Y. 87.

[6] Cases *supra;* Flanders *v.* Abbey, 6 Bis. 16; Conrad *v.* Le Blanc, 29 La. Ann. 123.

[7] Sutton *v.* Aiken, 62 Ga. 733.

[8] Donovan's Appeal, 41 Conn. 551.

[9] As to evidence in such cases, see Schoul. Hus. & Wife, § 262.

with mortgage or other collateral security upon specific property, upon the wife's separate property generally, so long as the debt was contracted for the benefit of the wife's separate property.[1] At law, of course, there may be no such remedy; and yet it should be borne in mind that local legislation frequently extends the legal rights of a married woman in this same direction.

§ 148. **Married Woman's Executory Promise; Purchase on Credit.** — In general it is held that a married woman cannot become personally liable on her general or executory promise except it concern expressly, under general rules, her benefit or her separate estate. Hence a note given by her upon any other consideration is void,[2] even though it be in the hands of a *bona fide* holder.[3] The wife's bond for payment of money does not bind her personally.[4] The wife cannot become a general borrower, even though she give a promissory note or security in the same connection.[5] Her general engagements, in a word, without the scope of the general rules we have stated, will create no charge upon her separate property enforceable in equity.[6] Some States, however, under their liberal enabling acts, repudiate such restrictions upon the *jus disponendi*.[7]

There is some difficulty in the purchase, by a married woman, of property, whether real or personal, on credit, arising out of the circumstance that she cannot make a contract for payment which will be personally binding.[8] There

[1] Armstrong *v.* Ross, 5 C. E. Green, 109.

[2] Kenton Ins. Co. *v.* McClellan, 43 Mich. 564; Pippen *v.* Wesson, 74 N. C. 437; Stokes *v.* Shannon, 55 Miss. 583.

[3] Kenton Ins. Co. *v.* McClellan, 43 Mich. 564.

[4] Huntley *v.* Whitner, 77 N. C. 392.

[5] O'Daily *v.* Morris, 31 Ind. 111; Way *v.* Peck, 47 Conn. 23; Viser *v.* Scruggs, 49 Miss. 705.

[6] Williams *v.* Hugunin, 69 Ill. 214; *supra*, § 144: Huyler *v.* Atwood, 26 N. J. Eq. 504; Stillwell *v.* Adams, 29 Ark. 346.

[7] See Allen *v.* Fuller, 118 Mass. 402; Knapp *v.* Smith, 27 N. Y. 277.

[8] In New Hampshire it was held that a married woman could not, under the statutes as they stood a few years ago, make a contract for money or property in anticipation of the purchase of separate estate; and hence that her note given for money borrowed, wherewith to make such purchase, was void. Ames *v.* Foster, 42 N. H. 381. But see later statutes of this State. Batchelder *v.* Sargent, 47 N. H. 262; Blake *v.* Hall, 57 N. H. 382. See also Thompson *v.* Weller,

is much logical confusion on this point; and the true equity rule appears to be to regard not so much the credit as the consideration of that credit, whether it were for her benefit or on express credit of the separate property. Where the wife cannot be sued upon her promise to buy upon credit, she will not in equity be allowed to decline and yet keep the property too; and hence lands or personal property sold her on her credit, and for the benefit of her separate estate, have been treated as subject to the vendor's lien, even though the notes she gave by way of executory contract could not, as such, be enforced against her.[1] And, once again, it is asserted, and quite fairly, that the sale to a married woman on credit is a voidable contract on her part; that she may either recede from the bargain and claim its annulment, or allow it to stand with a right in the vendor to subject the specific property to the payment of the debt.[2]

§ 149. **Married Woman's Ownership of Stock; Employment of Counsel.** — Transfers of a married woman's stock in a corporation require, under some statutes, the husband's written assent or joinder; under others, again, she may convey as if sole. After her transfer without observance of such requirements, she may, upon information of her legal rights, obtain a retransfer in equity, notwithstanding subsequent purchasers have intervened.[3]

85 Ill. 197. But on the other hand, the New York doctrine is that she may purchase property on credit; and if the vendor will run the risk of being able to obtain payment of the consideration of the sale, the transfer remains valid, and no estate will pass to the husband, whether the wife had previously any separate estate or not. Darby *v.* Calligan, 16 N. Y. 21; Knapp *v.* Smith, 27 N. Y. 277. So in other States. Chapman *v.* Foster, 6 Allen, 136; Shields *v.* Keys, 24 Iowa, 298. And her separate estate is in fact charged, under suitable circumstances, by her purchase on credit, as we have already seen. *Supra*, § 145.

[1] Pemberton *v.* Johnson, 46 Mo. 342; Bruner *v.* Wheaton, *ib.* 363; Carpenter *v.* Mitchell, 54 Ill. 126; Hunter *v.* Duvall, 4 Bush, 438; Smith *v.* Doe, 56 Ala. 456; Boland *v.* Klink, 63 Ga. 447.

[2] Nicholson *v.* Heiderhoff, 50 Miss. 56. See further, Schoul. Hus. & Wife, § 264.

The current of negative authority on this point turns much towards the purchase of real estate by the wife; and, upon what ought to be deemed more fundamental reasons than those of cash or credit, it is held that a married woman is incapable of acquiring real property to her separate use under such circumstances. This, however, is by no means a uniform doctrine. Schoul. Hus. & Wife, § 265.

[3] Merriam *v.* Boston R., 117 Mass.

In Rhode Island it is held that compensation of the wife's solicitor for prosecuting a suit in equity regarding her separate leaseholds cannot be recovered from her separate estate.[1] As to legal fees for the wife's divorce, some States still disincline to charge her estate, in absence, at all events, of an express undertaking on her part to that effect.[2] But in New York, professional services rendered a married woman, as in collecting demands arising out of transactions permitted her by the statute, are recoverable under the general rule against her separate estate, as rendered by her procurement on its credit and for its benefit.[3] Contracts by the wife for employing counsel in her property suits are in other States sustained more or less liberally, as in Indiana[4] and Mississippi.[5]

§ 150. **Joinder of Husband; Wife's Conveyances and Contracts.** — The rule in many States, under the married women's acts, is that the husband must join the wife in contracts and conveyances relating to her separate property. Particularly is this true of transactions concerning the wife's real estate, upon which topic we have already spoken.[6] Contracts and conveyances otherwise made are not considered binding.[7] The language of the married women's acts in many States authorizes the inference that nothing further than the written concurrence of the husband is requisite to complete the validity of the wife's transfer of separate personal property; the voluntary conveyance of the wife with her husband passes her separate estate, real or personal; nor is the husband's joinder always essential to her transfer of personal property.[8] And in some States the wife's sole deed of her separate real estate is sufficient to pass her entire interest;[9] though, so

241. See, further, Schoul. Hus. & Wife, § 268.

[1] Cozzens *v.* Whitney, 3 R. I. 79.

[2] Pfirshing *v.* Falsh, 87 Ill. 260.

[3] Owen *v.* Cawley, 36 N. Y. 600.

[4] Major *v.* Symmes, 19 Ind. 117.

[5] Porter *v.* Haley, 55 Miss. 66.

[6] *Supra*, § 133.

[7] Wright *v.* Brown, 44 Penn. St. 224; Pentz *v.* Simonson, 2 Beasl. 232; Major *v.* Symmes, 19 Ind. 117; Miller *v.* Hine, 13 Ohio St. 565; Schoul. Hus. & Wife, § 269, and cases cited.

[8] Trader *v.* Lowe, 45 Md. 1.

[9] Springer *v.* Berry, 47 Me. 330; Farr *v.* Sherman, 11 Mich. 33; Hale *v.* Christy, 8 Neb. 264; Libby *v.* Chase, 117 Mass. 105; Beal *v.* Warren, 2 Gray, 447.

antagonistic is this to the old common law, that a clearly enabling statute should be required.[1]

Following the spirit of recent legislation, some American courts now hold the wife liable on her covenants contained in a conveyance of her separate lands ;[2] or her agreement to assume a mortgage when taking a conveyance of lands so encumbered.[3] So specific performance is decreed against her on her written promise to convey ; provided the contract be executed with the formalities requisite in her conveyance.[4] And equity will not permit the wife to avoid a sale without refunding the purchase-money.[5] Under late Massachusetts statutes, moreover, a married woman may bind herself by her separate contract for the purchase of real estate.[6] In other States her ratification of a defective conveyance, whether directly or by acts presumptive, is pronounced valid.[7] All this, of course, is contrary to the old rule, which in many parts of the United States still obtains to a greater or less degree.[8]

A wife who joins suitably with her husband or trustee in a conveyance of her separate or general property, so as legally to convey it in conformity with statute, cannot afterwards assert her equitable title so as to avoid altogether or change from an absolute to a security title, as against a *bona fide* purchaser for value, having no notice of her equitable claim ;[9] nor, according to the growing opinion, assert a present or subsequent title after duly conveying her entire interest.[10] The recitals of her acknowledgment in the magistrate's certificate may be relied upon by a *bona fide* purchaser or mortgagee.[11]

[1] See further, Schoul. Hus. & Wife, § 269.

[2] Basford *v.* Peirson, 7 Allen, 524; Gunter *v.* Williams, 40 Ala. 561 ; Richmond *v.* Tibbles, 26 Iowa, 474.

[3] Huyler *v.* Atwood, 26 N. J. Eq. 504. And see Fenton *v.* Lord, 128 Mass. 466 ; Coolidge *v.* Smith, 129 Mass. 554.

[4] Woodward *v.* Seaver, 38 N. H. 29; Baker *v.* Hathaway, 5 Allen, 103. See Rumfelt *v.* Clemens, 46 Penn. St. 455; Stevens *v.* Parish, 29 Ind. 260; Love *v.* Watkins, 40 Cal. 547.

[5] Kolls *v.* De Leyer, 41 Barb. 208.

[6] Faucett *v.* Currier, 109 Mass. 79. For the New Jersey rule, see Pierson *v.* Lum, 25 N. J. Eq. 390.

[7] Spafford *v.* Warren, 47 Iowa, 47.

[8] Botsford *v.* Wilson, 75 Ill. 133 ; Stidham *v.* Matthews, 29 Ark 650 ; *supra*, c. 6 ; Gore *v.* Carl, 47 Conn. 291.

[9] Pepper *v.* Smith, 54 Tex. 115; Davidson *v.* Lanier, 51 Ala. 318; Comegys *v.* Clarke, 44 Md. 108.

[10] Knight *v.* Thayer, 125 Mass. 25; King *v.* Rea, 56 Ind. 1. But see Barker *v.* Circle, 60 Mo. 258.

[11] Singer Man. Co. *v.* Rook, 84 Penn.

Under some married women's acts a lease to her, and its covenants, as for rent or taxes, are held binding upon the wife;[1] and so, too, a lease from her.[2]

§ 151. **Improvements, Repairs, &c., on Wife's Lands; Mechanics' Liens.** — Upon the ground that the wife's separate estate should be bound by contracts for its benefit, or upon its express credit, her debts for improvements upon lands conveyed to her sole and separate use have been enforced in several late instances.[3] So, too, the joint contract or joint note of herself and husband, or in some States her sole note or sole contract, for lumber and materials to be used thereon. It is the declared rule of many States that the husband cannot of his own act, and without his wife's consent, subject the latter's separate land to debts for improvements, or subject it to a mechanic's lien.[4] But the mechanic's statutory right of lien generally extends to a married woman's lands where she contracted in person or by agent, and perhaps, too, where the contract was for the benefit of the land.[5] A husband's *bona fide* investment of money in improvements upon his wife's estate cannot be subjected to satisfaction of the claims of his creditors.

Apart from permanent improvements, a married woman's real estate may well be rendered liable for repairs made to her separate estate at her own request, and as necessary for its due preservation and enjoyment.

Independently, however, of enabling statutes, the written contract of a married woman, by which she acknowledges an indebtedness for materials and labor used to improve her separate estate, is void at law.[6]

St. 442; Marston *v.* Brittenham, 76 Ill. 611; Conn. Life Ins. Co. *v.* McCormick, 45 Cal. 580; Homœopathic Life Ins. Co. *v.* Marshall, 32 N. J. Eq. 103.

[1] Worthington *v.* Cooke, 52 Md. 297; Harris *v.* Williams, 44 Tex. 124; Albin *v.* Lord, 39 N. H. 196.

[2] Schoul. Hus. & Wife, § 271, and cases cited; Child *v.* Sampson, 117 Mass. 62; Douglass *v.* Fulda, 50 Cal. 77.

[3] Conway *v.* Smith, 13 Wis. 125; Fowler *v.* Seaman, 40 N. Y. 592; Carpenter *v.* Leonard, 5 Minn. 155; Schoul. Hus. & Wife, § 272.

[4] Briggs *v.* Titus, 7 R. I. 441; Spinning *v.* Blackburn, 13 Ohio St. 131; Schoul. Hus. & Wife, § 272.

[5] Vail *v.* Meyer, 71 Ind. 159; Woodward *v.* Wilson, 68 Penn. St. 208; Anderson *v.* Armstead, 69 Ill. 452; Marsh *v.* Alford, 5 Bush, 392; Schoul. Hus. & Wife, § 272, and cases cited.

[6] Williams *v.* Wilbur, 67 Ind. 42.

§ 152. **Mortgage of Wife's Lands.** — The husband cannot mortgage his wife's separate property for his individual debt;[1] for it is a general principle that the wife's separate property cannot be made liable for the debts of her husband or others without her assent.[2] But a mortgage given by a married woman upon her separate estate, acknowledged in conformity with the statute, and with the joinder of the husband, is a valid security and capable of enforcement; not alone where she had it mortgaged to secure her own or her husband's debt, but also, in a case free from fraud or undue influence, where it was mortgaged for the benefit of a third person.[3]

But in all such cases the wife's rights as surety are carefully guarded; and the husband cannot pervert the security to her detriment, nor bind her by his own agreement for extension or discharge. And, on the other hand, where she is a mortgagee in her own right, the husband cannot alone receive payment and satisfaction and discharge the mortgage.[4] The creditor's agreement of defeasance accompanying the transaction, or covenants on his part, must be faithfully observed;[5] and as to other security her rights are the usual ones.[6] It must be remembered that in certain States a conservative policy is still pursued, so as to prohibit the wife's mortgage to a greater or less extent, and with reference, perhaps, to the beneficial nature of the consideration.[7]

§ 153. **Wife's Separate Property; Husband as Managing Agent.** — The undoubted right of the wife, on general principles, to treat her husband as the trustee of her separate property, has given rise, under the married women's acts, to perplexing questions as between herself and his creditors. In New York, her privileges in this respect are carried very far; for she may employ her husband as her managing agent to control her property, without subjecting it to the claim of

[1] Patterson *v.* Flanagan, 1 Ala. s. c. 427.

[2] Hutchins *v.* Colby, 43 N. H. 159; Yale *v.* Dederer, 18 N. Y. 265; Johnson *v.* Runyon, 21 Ind. 115.

[3] See Schoul. Hus. & Wife, § 274, and cases cited.

[4] McKinney *v.* Hamilton, 51 Penn. St. 63.

[5] Lomax *v.* Smyth, 50 Iowa, 223.

[6] Wilcox *v.* Todd, 64 Mo. 388.

[7] Bowers *v.* Van Winkle, 41 Ind. 432; Lippincott *v.* Mitchell, 91 U. S. Supr. 767. See further, on this subject, Schoul. Hus. & Wife, §§ 276, 277.

his creditors; the application of an indefinite portion of the income to his support does not impair her title to the property; and neither he nor his creditors will acquire an interest in the property through his services thus rendered.[1] She may give him a power of attorney and require him to pursue its terms carefully.[2] In Illinois, too, it is well recognized that the wife may make her husband her agent to collect debts due her, to receive from others the income of her estate, and, like other agents, to manage and control her separate property in her name.[3] Such, too, is the rule of certain other States, to the practical disadvantage of the husband's creditors, as well as for the wife's protection against her husband.[4]

The husband's agency, whether created under suspicious circumstances or not, as regards the public, is, like other agencies, a matter of fact for legal ascertainment upon all the proof. The courts in Illinois go so far as to hold that the husband's dealings with his wife's separate property will now be presumed, in the absence of proof to the contrary, to be in the character of agent, even as to the proceeds and income thereof; and hence rendering him liable to account like other agents, with allowance of his reasonable compensation, but so as to require him to establish any claim he may make of a gift or legal transfer to him, by due proof that the wife so assented and understood; in short, that the common-law rights of the husband to the wife's property are swept away.[5] But in such a presumption other States by no means concur.[6]

§ 154. **Husband as Managing Agent; Services, &c.; Husband's Creditors.** — It seems to be the well-settled American doctrine that, by working upon the wife's lands, the husband acquires no beneficial interest therein which can be enforced

[1] Buckley *v.* Wells, 33 N. Y. 518; Knapp *v.* Smith, 27 N. Y. 277.

[2] Nash *v.* Mitchell, 71 N. Y. 199.

[3] Patten *v.* Patten, 75 Ill. 446.

[4] Aldridge *v.* Muirhead, 101 U. S. Supr. 397; Coleman *v.* Semmes, 56 Miss. 321; Wells *v.* Smith, 54 Ga. 262.

[5] Patten *v.* Patten, 75 Ill. 446.

[6] Eystra *v.* Capelle, 61 Mo. 578. See, further, Aldridge *v.* Muirhead, 101 U. S. Supr. 397; Paine *v.* Farr, 118 Mass. 74. The husband's agency is considered at length in Schoul. Hus. & Wife, §§ 277-280.

in equity on behalf either of himself or his creditors, in absence of a definite agreement for compensation; unless, possibly, it could be shown to exceed in value the cost of supporting the whole family.[1] The crops cannot be attached by his creditors.[2] Nor the betterments, buildings, and rents.[3] Nor is his use, upon his wife's farm, of teams bought with her money, a conversion in any such sense as to render them attachable for his debts.[4]

With the assent of the husband and father, the labor of the wife and children may be bestowed upon the separate property of the wife, and thus enure to their benefit. There is no known rule of law which requires the husband and father to compel his wife and children to work in the service of his creditors.[5] And it is held that the husband may stipulate, though insolvent, that the product of his own labor shall be appropriated to his wife's separate use.[6] If permitted to be maintained upon his wife's property, he does not necessarily acquire a title to the property or its products merely by bestowing his voluntary labor upon it.[7] And a similar principle may be applied to a wife supported from her husband's property.[8]

But it is held that the husband's occupation and cultivation of his wife's lands with her assent may be considered as bestowed for the common benefit of the family, or so as to give him the right to the products of his own toil like that of any tenant;[9] and that when his own skill and service were the chief source of emolument, the wife ought not to claim all as

[1] Buckley *v.* Wells, 33 N. Y. 518; Webster *v.* Hildreth, 33 Vt. 457; Cheuvete *v.* Mason, 4 Greene (Iowa), 231; Betts *v.* Betts, 18 Ala. 787; Commonwealth *v.* Fletcher, 6 Bush, 171.

[2] McIntyre *v.* Knowlton, 6 Allen, 565; Lewis *v.* Johns, 24 Cal. 98; Allen *v.* Hightower, 21 Ark. 316.

[3] White *v.* Hildreth, 32 Vt. 265; Goss *v.* Cahill, 42 Barb. 310; Wilkinson *v.* Wilkinson, 1 Head, 305; Robinson *v.* Hoffman, 15 B. Monr. 80.

[4] Spooner *v.* Reynolds, 50 Vt. 437.

[5] Johnson *v.* Vail, 1 McCart. 423.

[6] Hodges *v.* Cobb, 8 Rich. 50. But see Penn *v.* Whiteheads, 12 Gratt. 74.

[7] Rush *v.* Vought, 55 Penn. St. 437; Boss *v.* Gomber, 23 Wis. 284; Merrick *v.* Plumley, 99 Mass. 566; Gage *v.* Dauchy, 34 N. Y. 293; Hazelbaker *v.* Goodfellow, 64 Ill. 238; Feller *v.* Alden, 23 Wis. 301.

[8] Burcher *v.* Ream, 68 Penn. St. 421. See Dean *v.* Bailey, 50 Ill. 481, as to the liability of a farm and stock, where the husband's control is not of a character inconsistent with the common interests of himself and wife.

[9] Elijah *v.* Taylor, 37 Ill. 247.

her own against him.[1] Moreover, if by contract express or implied the wife is indebted to her husband for his services as managing agent, it is held that she is subject to garnishment at the instance of his creditors.[2]

§ 155. **Husband's Dealings with Wife's Property; Gift, Fraud, Use of Income, &c.** — Where the question arises, then, whether the husband is enjoying the wife's property by way of gift from her, or as her managing attorney, it must be determined by evidence. In either case the advantage seems to be with husband and wife in all controversies with the creditor. The general rule still prevails, however, that money transactions between husband and wife should be free from fraud, and not prejudicial to pre-existing creditors of the husband. The presumptions are not equally balanced in the different States. But presumptions of a gift from the wife are not to be strongly favored where the husband is held out to others as her agent.[3] So gifts of income would be more readily presumed than gifts of capital. Her title is generally open to inspection, and may be challenged for fraud.[4] But it is fair to say that whenever she gives her property to him without agreement for any repayment, but for investment in his business, and to afford him credit with the world, and he so invests it with her knowledge and acquiescence, or takes title to real estate in his own name, with her acquiescence, for a similar purpose, his *bona fide* creditors ought not, especially when his time and energies were of essential value to it, and changes of material or investment are such as to render identification of the property as hers impossible, to suffer afterwards, who had relied upon this capital, because of her attempt to recall the gift when she finds him embarrassed; not even a special partner would have a right to do so.[5] Furthermore, an invest-

[1] Glidden *v.* Taylor, 16 Ohio St. 509.

[2] Keller *v.* Mayer, 55 Ga. 406.

[3] See Wales *v.* Newbould, 9 Mich. 45; Miller *v.* Edwards, 7 Bush, 394; Patten *v.* Patten, 75 Ill. 446; Aldridge *v.* Muirhead, 101 U. S. Supr. 397.

[4] See School. Hus. & Wife, § 281; Albin *v.* Lord, 39 N. H. 196; Hinney *v.* Phillips, 50 Penn. St. 382; Fox *v.* Jones, 1 W. Va. 502; Logan *v.* Hall, 19 Iowa, 491; Bryant *v.* Bryant, 3 Bush, 155.

[5] Kuhn *v.* Stansfield, 28 Md. 210; Wortman *v.* Price, 47 Ill. 22; Mazouck *v.* Northern Iowa R. R. Co., 31 Iowa, 559; Lichtenberger *v.* Graham, 50 Ind. 288; Brooks *v.* Shelton, 54 Miss. 353; Mathews *v.* Sheldon, 53 Ala. 136; Besson *v.* Eveland, 26 N. J. Eq. 468. As to

ment, by the husband, of the wife's separate means and property, whether in purchasing real estate or personal property for her separate use, is valid, if the rights of creditors be not thereby impaired.[1] But where he purchases real estate or other property, and procures the title in his wife's name or in trust for her, when largely indebted, the validity of the transfer and its good faith may well be called in question, especially if the means were not clearly furnished from her separate estate.[2]

While the wife may avoid a fraud upon her as against all who participated therein, it is held that a valuable creditor's rights cannot be prejudiced by any duress, menace, or other misbehavior of the husband, which procured them the wife's security, if it was without such creditor's instigation, knowledge, or consent.[3] It is otherwise if the latter's instigation, knowledge, or consent appear.[4] But when the husband makes a void transfer as his wife's trustee, it is held that she can follow the investment into other hands.[5] Or she may have him removed from his trusteeship for suitable cause.[6]

A husband has no right to agree secretly with the purchaser of his wife's separate property for a portion of the real consideration, understating the nominal consideration to the wife; for this is a breach of faith as agent or trustee.[7] Fraud, coercion, abuse of marital confidence, can be alleged by the wife against an unworthy husband in support of her title, whether she transferred absolutely, or as security for his debts.[8] A negotiable instrument executed by or taken in the name of a trustee of a married woman will be regarded

the wife's gratuitous undertaking to subject her property to her husband's debts, the Pennsylvania rule is that equity will not enforce it, but leave the parties to their legal remedies. White's Appeal, 36 Penn. St. 134.

[1] Jackson *v.* Jackson, 91 U. S. Supr. 122.

[2] See Postnuptial Settlements, c. *post;* Snow *v.* Paine, 114 Mass. 520. See, further, Schoul. Hus. & Wife, § 282.

[3] Childs *v.* McChesney, 20 Iowa, 431; Edgerton *v.* Jones, 10 Minn. 427; Nelson *v.* Holly, 50 Ala. 3; Singer Man. Co. *v.* Rook, 84 Penn. St. 442; Marston *v.* Brittenham, 76 Ill. 511; Conn. Life Ins. Co. *v.* McCormick, 45 Cal. 480; Hull *v.* Sullivan, 63 Ga. 126.

[4] Line *v.* Blizzard, 70 Ind. 23; Haskit *v.* Elliott, 58 Ind. 493.

[5] George *v.* Ransom, 14 Cal. 658.

[6] Rainey *v.* Rainey, 35 Ala. 282. So with any other trustee of her separate property. Johnson *v.* Snow, 5 R. I. 72.

[7] Beaudry *v.* Felch, 47 Cal. 183.

[8] Sharpe *v.* McPike, 62 Mo. 300; Darlington's Appeal, 86 Penn. St. 512.

in equity as manifesting the trust for her benefit.[1] Even promissory notes taken in the husband's name are open to explanation; and evidence *aliunde* may show that they belonged to the wife's separate property.[2] Subject, perhaps, to equities of *bona fide* third parties for consideration, without notice of the trust in strong instances, the wife's rights are protected in equity against her husband's misdealings with her fund.[3] And if a husband holds a legal title to land in trust for his wife or family, his sale and transfer of the proceeds to other land, taken without due consent in his own name, will not enable his general creditors to seize and appropriate it for his debts.[4]

Certain States, following the English equity doctrine, avoid close inquisition into the husband's management of his wife's property, by limiting the time during which the husband's receipt of the rents, profits, or income shall charge him.[5] It is held, too, that a wife, by allowing her husband for a long series of years to appropriate to his own use, or their joint use, the income of her separate estate, forfeits her right to compel him to account, until at all events she revokes such permission, and then only from the date of revocation.[6] Such a rule is very desirable for preserving domestic peace, and ensuring the husband's estate after death against dubious claims; for otherwise, as we have intimated, and apart from the wife's delay or her presumed assent to household expenses or to a gift to her husband, and after deducting his charge for services, the husband, where regarded as purely an agent, is obligated to account. Even admitting, however, the income his, the husband may show and execute an intention of preserving such income as his wife's separate property.[7]

[1] Lewis *v.* Harris, 4 Met. (Ky.) 353.

[2] Buck *v.* Gilson, 37 Vt. 653; Conrad *v.* Shomo, 44 Penn. St. 193; Baker *v.* Gregory, 28 Ala. 544; Fowler *v.* Rice, 31 Ind. 258.

[3] See Moulton *v.* Haley, 57 N. H. 184.

[4] Shippen's Appeal, 80 Penn. St. 391; Porter *v.* Caspar, 54 Miss. 359; Schoul. Hus. & Wife, § 284; McConnell *v.* Martin, 52 Ind. 434.

[5] One year from date of such receipt is the Mississippi limitation. Hill *v.* Bugg, 52 Miss. 397.

[6] Lyon *v.* Green Bay R., 42 Wis. 548; Reeder *v.* Flinn, 6 Rich. 216; Lishey *v.* Lishey, 2 Tenn. Ch. 5.

[7] Gill *v.* Woods, 81 Ill. 64; Patten *v.* Patten, 75 Ill. 446; Bongard *v.* Core, 82 Ill. 19, *supra*, § 141.

On the whole there is and must be, throughout this transition period, conflict in the authorities as to the effect of a husband's receiving the proceeds of his wife's share in inherited property, or of some sale or investment in her sole right: States which abide by the common law of coverture inclining to sustain his ancient right of reduction into possession, and presuming in his favor;[1] and States, on the other hand, under the impress of the new legislative policy, reserving her title, unless she plainly and voluntarily divests herself of separate rights.[2]

§ 156. **Married Woman as Trustee.** — Appointing a married woman trustee may be considered objectionable (apart from equity rules of constructive trust) while the law yet fails to divest her of all coverture disabilities, so as to make her both efficient and responsible in the legal sense. Yet it is held in some States that a married woman may, under the statutes, hold an estate in trust, and make contracts accordingly.[3]

§ 157. **Tendency as to Wife's Binding Capacity; her Estoppel.** — There is now little or no limit upon the wife's legal capacity to bind her statutory estate to the discharge of liabilities created on account thereof, in Ohio, Wisconsin, Massachusetts, New York, Illinois, and some other States. In Illinois it is said that capacity to make contracts respecting her separate property is an implication of law and not of equity, and consequently all contracts made by her within the scope of that legal capacity are legal contracts, and cognizable in the courts of law.[4]

As a natural result of the first modern innovations upon the coverture theory, it may be observed that, while estoppel does not work against a married woman so readily as against persons *sui juris*, it is held in various recent instances, and justly too, that where married women make agreements by

[1] Reade *v.* Earle, 12 Gray, 423; Windsor *v.* Bell, 61 Ga. 671; Nevius *v.* Gourley, 95 Ill. 206; Jacobs *v.* Hesler, 113 Mass. 157.

[2] Nissley *v.* Heisey, 78 Penn. St. 418; Penn *v.* Young, 10 Bush, 626; Moyer's Appeal, 77 Penn. St. 482.

[3] Springer *v.* Berry, 47 Me. 330. See Pemberton *v.* McGill, 1 Dr. & Sm. 266.

[4] Williams *v.* Hugunin, 69 Ill. 214; Schoul. Hus. & Wife, § 288.

fraudulent means, with reference to their separate property, and thus obtain inequitable advantages, a court of chancery will treat them as estopped from setting up and relying on their coverture to retain the advantage.[1]

§ 158. **Proceedings for Charging Wife's Separate Estate.** — The married women's acts in some States make, as might be anticipated, a radical change in the character of the practice for reaching the wife's separate property. According to the English practice, and that prevalent now or formerly in most States, there was no personal judgment against a married woman. But a chancery decree was directed against the separate property of the wife, declaring the separate estate vested in the wife at the date of the decree, which it was within her power to dispose of, chargeable with the payment of the debt.[2] The debt was not a lien upon the wife's separate estate until made so by decree of the court of equity, and the lien was by virtue of such decree.[3] Under such proceedings there was only a sort of equitable execution, the decree reaching only property which the wife had power to bind, and no personal judgment being awarded against her, — nothing from which direct personal liability on her part could be predicated.

But under this recent married women's legislation the same judgment is required, with the same process for its enforcement, as would be awarded if the woman were sole; saving, perhaps, the usual exemptions, and treating the wife's property in such case substantially as the husband's property might be treated were the judgment rendered against him and the liability his. And where such is the practice, no equitable circumstances can usually be alleged, calling for the intervention of a court of equity.[4] Legal attachment on mesne process, or by way of legal execution against a mar-

[1] Coolidge *v.* Smith, 129 Mass. 554; Patterson *v.* Lawrence, 90 Ill. 174. See further, Schoul. Hus. & Wife, § 288.

[2] Johnson *v.* Gallagher, 3 De G. F. & J. 520; Collett *v.* Dickenson, L. R. 11 Ch. D. 687; Patrick *v.* Littell, 36 Ohio St. 79; Armstrong *v.* Ross, 20 N. J. Eq. 109.

[3] *Ib.*; Schoul. Hus. & Wife, § 289.

[4] Stevens *v.* Reed, 112 Mass. 515; Patrick *v.* Littell, 36 Ohio St. 79; Cookson *v.* Toole, 59 Ill. 515; Andrews *v.* Monilaws, 15 N. Y. Supr. 65.

ried woman, may be made under such statutes ;[1] or, in appropriate instances, the foreign attachment or trustee process applied.[2] Even upon her covenants the wife may, in some States, be sued like a single woman.[3]

On the whole, policy still disinclines to permit a personal judgment to be rendered against a married woman, even on what purports to be her personal obligation. The subjection of the wife's property, furthermore, under these acts, extends to all her statutory separate estate, or, as might generally turn out, by the changing of equitable into statutory estates by operation of legislation, all her separate property. And by this means the old distinction between the real and personal separate estate becomes well-nigh obliterated.[4]

§ 159. **English Married Women's Act; Wife's Disposition.**— In England the married women's property act of 1870, with its later amendments, indicates some change of parliamentary policy in the same practical direction. But the English courts still incline, as would the American under statutes of dubious import, to render the separate property of the wife liable by subjecting her to the ordinary process of law and equity.[5] The wife cannot be sued alone in respect of her separate estate in the common-law courts, under the act of 1870, for the price of goods sold her during coverture, but, as formerly, the husband must be joined.[6]

[1] See language of Hoar, J., in Willard *v.* Eastham, 15 Gray, 328.

[2] Powers *v.* Totten, 42 N. J. L. 442.

[3] Worthington *v.* Cooke, 52 Mo. 297.

[4] For various points of modern statutory practice, see Schoul. Hus. & Wife, § 289.

[5] *Ex parte* Holland, L. R. 9 Ch. App. 307.

[6] Hancocks *v.* Lablache, 26 W. R. 402; Davies *v.* Jenkins, L. R. 6 Ch. D. 728.

CHAPTER XII.

THE WIFE'S PIN-MONEY, SEPARATE EARNINGS, AND POWER TO TRADE.

§ 160. **The Wife's Pin-Money.** — The wife's pin-money constitutes a feature of English marriage settlements in modern times. Pin-money may be defined as a certain provision for the wife's dress and pocket, to which there is annexed the duty of expending it in her "personal apparel, decoration, or ornament."[1] It differs from the wife's separate estate in being a gift subject to conditions, and not at her absolute disposal. It differs from her *paraphernalia* in being subject to her control during marriage, and not awaiting the husband's death.[2] The exact period when pin-money was first introduced into England is not known. Lord Brougham inclines to ascribe it to the feudal times.[3] But there is equally good authority for fixing the date at the Restoration; and the lawyers resort to Addison's "Spectator" in proof of the latter supposition.[4] The popular name of this provision scarcely suggests its real significance; for, so far from being a petty allowance, it is often of the most liberal amount imaginable.[5]

The subject of the wife's pin-money seems to have received little attention in this country.[6] And in England few cases of the sort have ever arisen. It is found more convenient in marriage contracts to settle a certain allowance upon the wife by way of separate estate, which allowance is subject

[1] Per Lord Langdale, Jodrell *v.* Jodrell, 9 Beav. 45; Howard *v.* Digby, 2 Cl. & Fin. 654.

[2] Macq. Hus. & Wife, 318; Peachey Mar. Settl. 298; c. *post.*

[3] 2 Cl. & Fin. 676.

[4] Spectator, 295. See Peachey Mar. Settl. 300; Sugd. Law Prop. 165.

[5] In one reported English case, by no means recent, £13,000 a year was secured to the wife as her pin-money. See 2 Russ. 1, and *n.* to Macq. Hus. & Wife, 318.

[6] But see Miller *v.* Williamson, 5 Md. 219.

to the usual incidents of separate property. Decisions as to pin-money and separate estate are frequently confounded.[1]

§ 161. **Wife's Housekeeping Allowance** — The wife was formerly supposed also to gain a title to savings out of her housekeeping allowance.[2] So where the husband allowed the wife to make profit of butter, eggs, poultry, and other farm produce, which allowance he called her pin-money, it was held that she acquired a separate ownership therein.[3] But these cases rest upon questionable authority.[4] And more recently it has been decided that, where the wife of a farmer, with his knowledge and sanction, deposited the produce of the surplus butter, eggs, and poultry with a firm in her own name, and he called it "her money," and on his death-bed gave his executor directions to remove the money, and do the best he could with it for his wife, such evidence was insufficient to establish a gift between them, and that the husband had made neither the firm nor himself trustee for his wife.[5] In all cases of this sort the husband's permission, he not having deserted her, constitutes an important element of the wife's title. And the mere fact that a wife is in the use and enjoyment of clothing, or other personal property, is held insufficient to establish her right to a separate estate therein.[6]

§ 162. **Wife's Earnings belong to the Husband; Legislative Changes, &c.** — Indeed, the well-settled principle, both of law and equity, is that, in absence of a distinct gift from the husband, all the wife's earnings belong to him and not to her-

[1] See Lord Brougham, in Howard *v.* Digby, 2 Cl. & Fin. 670, commenting upon 2 Roper Hus. & Wife, 133. In this leading case, which went to the House of Lords in 1834, the whole subject receives ample discussion. Its main decision was to the effect that the personal representatives of the wife could not recover arrears. The correctness of its principle has been questioned by some writers. In general the usual equity rule against claiming more than one year's arrears appears to apply to separate estate and pin-money alike. In other ways, too, the wife's claim may be barred. Schoul. Hus. & Wife, § 292.

[2] Paul Neal's Case, Prec. in Ch. 44, 297. But see Tyrrell's Case, Freem. 304.

[3] Slanning *v.* Style, 3 P. Wms. 337

[4] See Macq. Hus. & Wife, 320.

[5] Mews *v.* Mews, 15 Beav. 529. See McLean *v.* Longlands, 5 Ves. 78, cited herein with approval. And see Rider *v.* Hulse, 33 Barb. 264, for a similar American decision.

[6] State *v.* Pitts, 12 S. C. 180; *supra*, § 82.

self.[1] But by recent statutes, enacted in many of the United States, married women are allowed the benefits of their own labor and services when performed, or even contracted to be performed, on their sole and separate account, free from all control or interference of a husband.[2] The English married women's act of 1870, moreover, recognizes the wife's right to her separate earnings.[3] These statutes vary somewhat in their terms. The amount she may thus acquire is in certain States limited to a specific sum, and statutes sometimes discriminate so as to protect simply the wife's earnings derived from labor for another than her husband.[4]

The presumptions here concerning the wife's title to her earnings seem to be much the same as in other separate property purporting to belong to her.[5] Questions of identity, too, in tracing an investment of earnings, are applicable, as in other cases of separate property. There is, however, apparently less favor shown by our courts to the legislative grant of separate earnings, than to that of acquisitions to a wife's separate use from other sources; and still less, as we shall soon see, to statutes extending the wife's right of acquiring earnings to a permission to embark in business on her own account. The presumption is said to be, that a wife's services, rendered even to her own mother on a basis of compensation, were given on the husband's behalf.[6] And where the proceeds of her earnings have been so mixed up with her husband's property as not to be easily distinguishable, the disposition is to regard the whole as belonging to the husband.[7] The idea, moreover, is not favored, of permitting a

[1] For the old common-law rule, see *supra*, § 81; Jones *v.* Reid, 12 W. Va. 350; Douglas *v.* Gausman, 68 Ill. 170; Kelly *v.* Drew, 12 Allen, 107; Glaze *v.* Blake, 56 Ala. 379.

[2] See latest statutes of New York, Massachusetts, Rhode Island, Maryland, Kansas, and California. And see Cooper *v.* Alger, 51 N. H. 172; Fowle *v.* Tidd, 15 Gray, 94; Tunks *v.* Grover, 57 Me. 586; Meriwether *v.* Smith, 44 Ga. 541; Berry *v.* Teel, 12 R. I. 267; Attebury *v.* Attebury, 8 Oreg. 224; Larimer *v.* Kelley, 10 Kan. 298; Jassoy *v.* Delius, 65 Ill. 469; Whitney *v.* Beckwith, 31 Conn. 596.

[3] *Supra*, § 111; Lovell *v.* Newton, L. R. 4 C. P. D. 7.

[4] Snow *v.* Cable, 19 Hun, 280.

[5] Raybold *v.* Raybold, 20 Penn. St. 308; Elliott *v.* Bently, 17 Wis. 591; Laing *v.* Cunningham, 17 Iowa, 510.

[6] Morgan *v.* Bolles, 36 Conn. 175.

[7] Quidort *v.* Pergaux, 3 C. E. Green, 472; McCluskey *v.* Provident Institution, 103 Mass. 300; Kelly *v.* Drew, 12 Allen, 107.

wife to forsake the matrimonial domicile, or neglect her household duties, without her husband's consent, for the purpose of acquiring earnings for her separate use, especially if her husband be still legally bound to support her by his own labor.[1] It may be added that, in general, statutes which authorize married women to hold property acquired by gift, grant, or purchase, from any person other than the husband, do not carry the wife's earnings by implication.[2]

Independently, therefore, of statutes which plainly secure to married women their separate earnings under the circumstances, it is held that an agreement between the wife, with the knowledge and consent of her husband, and a third person, for nursing and attention, the stipulation being that she shall be paid what her services are reasonably worth, gives to the wife no title as against her husband,[3] nor right to maintain her separate action.[4] On general principles of equity, however, the husband may, in this country, as in England, create in his wife a separate estate in the proceeds of her own toil; the validity of such a gift, as against creditors, being subject to the same rules which apply to other voluntary conveyances.[5] Such a gift on his part, once made, the husband cannot annul, by a subsequent investment of the proceeds in his own name.[6]

§ 163. **Wife's Power to Trade; Earlier English Rules.** — The wife's power to carry on a separate trade is another topic,

[1] Douglas *v.* Gausman, 68 Ill. 170; Mitchell *v.* Seitz, 94 U. S. Supr. 580. But see Duncan *v.* Cashin, L. R. 10 C. P. 554.

[2] Rider *v.* Hulse, 33 Barb. 264; Hoyt *v.* White, 46 N. H. 45; Merrill *v.* Smith, 37 Me. 394; Grover *v.* Alcott, 11 Mich. 470; Baxter *v.* Prickett, 27 Ind. 490; Bear *v.* Hays, 36 Ill. 280.

[3] Woodbeck *v.* Havens, 42 Barb. 66. And this, even though the husband makes of his house a sort of hospital, and his wife assists him. Reynolds *v.* Robinson, 64 N. Y. 589. And see Elliott *v.* Bently, 17 Wis. 591; Duncan *v.* Roselle, 15 Iowa, 501; McKavlin *v.* Bresslin, 8 Gray, 177.

[4] See Beau *v.* Kiah, 6 Thomp. & C. (N. Y.) 484. And see Skillman *v.* Skillman, 15 N. J. Ch. 478; Schoul. Hus. & Wife, § 295.

[5] Pinkston *v.* McLemore, 31 Ala. 308; Neufville *v.* Thompson, 3 Edw. Ch. 92; Barron *v.* Barron, 24 Vt. 375; Richardson *v.* Merrill, 32 Vt. 27; Jones *v.* Reid, 12 W. Va. 350; Glaze *v.* Blake, 56 Ala. 379; Schoul. Hus. & Wife, § 296. See Postnuptial Settlements, *post*, where the rule is more fully stated.

[6] Rivers *v.* Carleton, 50 Ala. 40; White *v.* Oeland, 12 Rich. 308; Mason *v.* Dunbar, 43 Mich. 407. Wife's earnings are sometimes bestowed on her by statute, where the husband deserts. Schoul. Hus. &. Wife, § 297. See further, as to earnings, *ib.* § 298.

known long ago to the law of England; and in this respect our American legislation of the present day seems to have been somewhat anticipated. The wife's lawful power to carry on a trade on her own account, independently of her husband, like most of her other separate privileges, is founded at the common law upon contracts made with her in derogation of the husband's marital rights. It appears that a wife, desiring to go into business on her own account, makes an agreement with her husband. When the agreement is made before marriage, it will bind the husband and his creditors; when made during the coverture, it binds the husband only, and is void against his creditors.[1] And the husband will be liable for the debts, if it appeared that he participated with the wife in the benefits.[2] Separate trading was also permitted the wife by the "custom of London;" and herein she was regarded as liable to arrest and imprisonment for debt without her husband, and, moreover, might be declared a bankrupt.[3] And if the husband had any concern in the business, the wife was not to be treated as a *feme sole* in respect of it.[4]

Notwithstanding these provisions of the law, it does not appear that separate trading in England, prior to the innovations introduced with the married women's act of 1870, was ever very common.[5] The difficulties in the way of establishing credit, and of negotiating securities, on the wife's sole behalf, were probably found insurmountable, even though married women might be found anxious to assume the responsibilities of trade, with its incidental imprisonment for debt. The judicial evidence of this separate trading is supplied chiefly by

[1] Macq. Hus. & Wife, 321; 2 Bright Hus. & Wife, 292; Lavie *v.* Phillips, 3 Burr. 1783; 2 Roper Hus. & Wife, 165, 175, and cases cited. See Antenuptial and Postnuptial Settlements, cs. *post.*

[2] Jarman *v.* Wooloton, 3 T. R. 618; 2 Bright Hus. & Wife, 297; Schoul. Hus. & Wife, § 299; Barlow *v.* Bishop, 1 East, 432; Petty *v.* Anderson, 2 Car. & P. 38; Macq. Hus. & Wife, 322.

[3] Beard *v.* Webb. 2 B. & P. 97. See 2 Roper Hus. & Wife, 124.

[4] 2 Bright Hus. & Wife, 77, 78; Lavie *v.* Phillips, 3 Burr. 1776; Schoul. Hus. & Wife, § 300.

[5] But see the recent cases of Talbot *v.* Marshfield, L. R. 3 Ch. 622; *Re* Peacock's Trusts, L. R. 10 Ch. D. 490; Ashworth *v.* Outram, L. R. 5 Ch. 923; Schoul. Hus. & Wife, § 301.

the misfortunes such trade entailed upon the women who embarked in it. Even where the wife lived apart from her husband (a very important consideration [1]), and, having her separate estate, carried on a trade, it was doubted, in an important case of which we have spoken elsewhere, whether the tradesman furnishing supplies had any demands upon that estate which equity could recognize.[2]

§ 164. **Wife's Power to Trade; American Equity Rule.** — This doctrine of the wife's power to trade comes up anew in the United States of late years, with our recent policy in favor of the independence of married women. And the rule seems, apart from late legislation, to be well established in the United States, that the husband, in pursuance of a marriage contract, antenuptial or postnuptial, may confer upon his wife the right to trade for her exclusive benefit.[3] Nor have the American cases uniformly insisted upon formal contracts for this purpose between husband and wife; seemingly regarding the question as one of mutual and *bona fide* intention merely.[4] The husband's assent is in general necessary, provided they live together; and if they do not, different considerations apply.[5] And apart from statute, it would appear to be the general rule, that unless the husband's consent that the wife carry on business in her own name is based upon a sufficient consideration, he may withdraw it at any time and assert his common-law rights.[6]

[1] See Separation, *post.*

[2] Cf. Bruce & Turner, Lord Justices, in Johnson *v.* Gallagher, 3 De G. F. & J. 494.

[3] Richardson *v.* Merrill, 32 Vt. 27; Tillman *v.* Shackleton, 15 Mich. 447; Wieman *v.* Anderson, 42 Penn. St. 311; Duress *v.* Horneffer, 15 Wis. 195; James *v.* Taylor, 43 Barb. 530; Wilthaus *v.* Ludicus, 5 Rich. 326; Uhrig *v.* Horstman, 8 Bush, 172; Cowan *v.* Mann, 3 Lea, 229.

[4] See per Redfield, C. J., in Richardson *v.* Merrill, 32 Vt. 27; Partridge *v.* Stocker, 36 Vt. 108; Penn *v.* Whitehead, 17 Gratt. 503; Tillman *v.* Shackleton, 15 Mich. 447; Wieman *v.* Anderson, 42 Penn. St. 311; Todd *v.* Lee, 16 Wis. 480; Mayhew *v.* Baker, 15 Ind. 254; Schoul. Hus. & Wife, *passim*, §§ 303, 304.

[5] Cropsey *v.* McKinney, 30 Barb. 47; Green *v.* Pallas, 1 Beasl. 267.

[6] Conklin *v.* Doul, 67 Ill. 355; Cropsey *v.* McKinney, 30 Barb. 47; Todd *v.* Lee, 16 Wis. 480; Richardson *v.* Merrill, 32 Vt. 27; Partridge *v.* Stocker, 36 Vt. 108; Penn *v.* Whitehead, 17 Gratt. 503; King *v.* Thompson, 87 Penn. St. 365. Some old statutes recognizing the wife as a *feme sole* trader appear to have existed in Pennsylvania and South Carolina. Schoul. Hus. & Wife, § 305.

On the other hand, in North Carolina the whole doctrine of separate trading is expressly repudiated.[1] Indeed, our earlier American cases seem to have regarded with very little favor the doctrine that the wife, while living with her husband, could carry on a business of her own without rendering her husband liable and subjecting her stock in trade to his debts.[2] And the same may be said, at this day, of States whose legislatures have not freely conceded rights to married women.[3]

§ 165. **Conclusion from English and American Decisions.** — The conclusion to be drawn from this class of cases is that, modern policy having once conferred upon the wife large powers both as to the acquisition and enjoyment of separate property, as well as the right to invest and reinvest the same, including their rights under marriage settlements, married women naturally sought business opportunities with their capital; and thus the modern courts, confronted with the practical results, and aided by precedents from old local customs or old legislation, were drawn into the practical concession of trading privileges, and hence of trading liabilities, while professing to deny to the wife on general principles the right to engage in mercantile pursuits without more explicit statute provisions to that effect, and while requiring the assent of the husband to appear.

When it is clearly for the wife's advantage to reap the benefits of her business, the disposition of the law to yield them must be strong; but where, as must often be the case, she speculates imprudently and becomes deeply involved, the court is perplexed, though doubtless anxious to relieve her. In some leading cases, upon this point, we find the married woman who has subjected her property to the demands of her husband's creditors permitted to stand in equity, where the business fails, as a sort of preferred creditor, for her manifest benefit.[4] The creditor's claim for supplies is of at

[1] McKinnon *v.* McDonald, 4 Jones Eq. 1. As to Alabama, see Newbrick *v.* Dugan, 61 Ala. 251.

[2] Mackinley *v.* McGregor, 3 Whart. 378, and cases cited.

[3] Godfrey *v.* Brooks, 5 Harring. 396; Woodcock *v.* Reed, 5 Allen, 207, *per curiam*

[4] Penn *v.* Whitehead, 17 Gratt. 503; Richardson *v.* Merrill, 32 Vt. 27; Cowan *v.* Mann, 3 Lea, 229. See Bellows *v.* Rosenthal, 31 Ind. 116.

least doubtful equity;[1] such indebtedness must usually be pronounced void at law;[2] while even equity will decline to enter a decree establishing a charge on the wife's estate, unless the husband, or some other trustee for the wife, is properly before the court.[3] And if equity, unaided by legislation, preserves the separate capital thus invested in trade, that the wife may enjoy its benefits, it is otherwise with profits which may have accrued beyond the interest of such capital.[4]

§ 166. **Enlargement of Wife's Power to Trade under Recent Statutes.** — But the doctrine of a wife's separate trading is at this day to be considered under the combined influence of modern equity decisions as to the wife's *jus disponendi*, and the recent married women's acts. The English act of 1870 declares that wages and earnings of a married woman shall be her separate property;[5] under construction of which act, the English chancery has lately sustained the right of a butcher's wife to carry on her husband's business upon her separate resources, he being incapacitated through delirium tremens, and, while at home, offering no obstruction to her course.[6] Again, both under the act of 1870 and independently of it, chancery protected the widow's interests as against the husband's administrator, after his death, in a valuable fruit-preserving business, which she had commenced while single; then continued, after her marriage in 1874, to carry on in her maiden name, her husband consenting.[7]

The recent married women's acts in many of the United States have enlarged and more fully established the wife's power to trade on her own account; and the profits of her

[1] Johnson *v.* Gallagher, 3 De G. F. & J. 494, Copeland *v.* Cunningham, 31 Ind. 116. But see Todd *v.* Lee, 16 Wis. 480; Partridge *v* Stocker, 36 Vt. 108.

[2] Conklin *v.* Doul, 67 Ill. 355.

[3] *Ibid.*

[4] Jassoy *v.* Delius, 65 Ill. 469; Jenkins *v.* Flinn, 37 Ind. 349, and cases cited; Dumas *v.* Neal, 51 Ga. 563; Clinton Man. Co. *v.* Hummell, 25 N. J. Eq. 45, Schoul. Hus. & Wife, § 307.

[5] Act 33 & 34 Vict. c. 93; *supra*, § 203.

[6] Lovell *v.* Newton, L. R. 4 C. P. D. 7. If his assent was not clearly shown to his wife's trade, there would appear to have been a pretty fair inference from the facts, that he gave it.

[7] Ashworth *v.* Outram, L. R. 5 Ch. 923. As to selling out the good-will, see *Re* Peacock's Trusts, L. R. 10 Ch. D. 490.

business are thus secured to her sole and separate use.[1] She is thus enabled to use her separate property; and she may even enter, in some States, into a general partnership for trade. In general, what the wife acquires under these statutes is declared to be exempt from liability for the husband's debts, and not subject to his control or interference. But the statutes of certain States require the married woman to first register her intention, thus affording a very reasonable safeguard against fraud and imposition upon the public and herself, besides requiring that the act be a deliberate one;[2] and the husband will be held liable on her contract where the certificate is not duly filed.[3] In Kentucky, special authority to trade must first have been conferred by the chancellor.[4] Such requirements not being complied with, the creditors of the husband may come upon the assets of the business.

The wife, under such statutes, is found engaged on her separate account, as milliner and dressmaker,[5] farmer,[6] boarding-house keeper,[7] army sutler,[8] operator of a mill,[9] saloon-keeper,[10] tavern-keeper,[11] or in whatever other business she may choose to carry on with her own capital. Even though the trade be unsuitable to her sex, fraud upon the husband's creditors will not be conclusively presumed.[12] But it is held that the business under such statutes should be pursued as a continuing and substantial employment.[13]

§ 167. **Wife's Trading Liabilities under American Statutes.** — Under these American statutes permissive of the wife's separate trade, it is a general rule that the wife's contracts re-

[1] Such statutes are to be found in New York, Maine, New Hampshire, Massachusetts, Connecticut, Kansas, New Jersey, Iowa, California, Wisconsin, Illinois, Arkansas, Mississippi, and other States. And see Mitchell *v.* Sawyer, 21 Iowa, 582; Schoul. Hus. & Wife, § 309, and appendix.

[2] Mass. Stats. 1862, c. 198. See Schoul. Hus. & Wife, § 309.

[3] Feran *v.* Rudolphsen, 106 Mass. 471.

[4] Uhrig *v.* Horstman, 8 Bush, 172.

[5] Jassoy *v.* Delius, 65 Ill. 469; Tuttle *v.* Hoag, 46 Mo. 38.

[6] Kouskop *v.* Shontz, 51 Wis. 204; Snow *v.* Sheldon, 126 Mass. 332.

[7] Harnden *v.* Gould, 126 Mass. 411; Dawes *v.* Rodier, 125 Mass. 421.

[8] Swasey *v.* Antram, 24 Ohio St. 87.

[9] Cooper *v.* Ham, 49 Ind. 393.

[10] Nispel *v.* Laparle, 74 Ill. 306.

[11] Silveus *v.* Porter, 74 Penn. St. 448.

[12] Guttman *v.* Scannell, 7 Cal. 455.

[13] Holmes *v.* Holmes, 40 Conn. 117.

garding her separate trade or business are binding on her separate property, and that the husband is not answerable for her solvency. With reference thereto she may make contracts, and sue and be sued, as if sole, except (as such statutes usually run) that where she is sued the remedy is to be enforced against her separate property only, and not against her person. She may make contracts of sale, and sue for goods sold and delivered to her customers.[1] The power, to do business implies, too, the power to purchase goods, fixtures, and stock for it, and execute the needful instruments of purchase; and hence the wife's contracts for such purchase on credit, her notes, bills, securities, or simple indebtedness therefor, must be deemed obligatory and enforceable by suit or otherwise.[2] And what she thus purchases, in the exercise of her trading discretion, is to be held and treated as her sole and separate property as against her husband and his creditors.[3] Where, too, the married woman keeps a separate bank account, with reference to such business, the check which she draws against it and the fund itself are available to her business creditors.[4] What she borrows by way of capital to commence the business, she is required to refund.[5]

§ 168. **Wife's Trade; Husband's Participation.** — It follows that under such legislation the husband is not liable on the

[1] Porter *v.* Gamba, 43 Cal. 105; Netterville *v.* Barber, 52 Miss. 168; Trieber *v.* Stover, 30 Ark. 727. The contracts of married women, made by virtue of such statute capacity, should not be viewed with hesitation or suspicion by the courts, but should be fully enforced. Netterville *v.* Barber, 52 Miss. 168.

[2] Nispel *v.* Laparle, 74 Ill. 306; Kouskop *v.* Shontz, 51 Wis. 204; Wheaton *v.* Phillips, 1 Beasl. 221; Reading *v.* Mullen, 31 Cal. 104; Schoul. Hus. & Wife, § 310.

[3] Tallman *v.* Jones, 13 Kans. 438; Meyers *v.* Rahte, 46 Wis. 655; Sammis *v.* McLaughlin, 35 N. Y. 647; Silveus *v.* Porter, 74 Penn. St. 448; Dayton *v.* Walsh, 47 Wis. 113.

[4] Nash *v.* Mitchell, 15 N. Y. 471.

[5] Frecking *v.* Rolland, 53 N. Y. 442. As to purchasing fixtures of real estate for carrying on the business, see *Ib.*; Dayton *v.* Walsh, 47 Wis. 113; Kouskop *v.* Shontz, 51 Wis. 204.

On general principles, equity will enjoin a married woman who sells out a business and its good-will, which she has carried on for her separate account, from violating her own agreement with the purchaser in restraint of future competition or interference; for in this respect a married woman should not be regarded more favorably than others who dispose of their business to *bona fide* purchasers. Morgan *v.* Perhamus, 36 Ohio St. 517. And see *Re* Peacock's Trusts, L. R. 10 Ch. D. 490.

wife's contracts and liabilities incurred in the pursuit of her separate business, unless he participates in it.[1] But his participation will not unfrequently be found in the modern cases; and hence arises legal uncertainty, and often a suspicion of fraudulent arrangements against one another's creditors. Does the proof, we must ask, under any such circumstances, show that the wife carried on no separate trade, but was her husband's agent? or that she did, and the husband was her agent? or that they were in partnership together?

In Massachusetts, where the statutory doctrine of the wife's power to trade and acquire separate earnings has already received a considerable exposition in the courts, it is held that where a married woman carries on the business of keeping boarders on her sole and separate account, and has purchased goods to be used in her business on her sole credit, she alone is liable, although her husband lived with her when the goods were purchased; and her own acts and admissions in reference to the business are competent evidence against her.[2] In Maine the husband cannot be sued for goods and chattels furnished his wife by third persons in the course of her business, even though such purchases were made by her with his knowledge and consent, and although she appropriated part of the proceeds to the support of her husband and family.[3] But where the purchase and sales are made with the husband's knowledge and consent, and he participates in the profits of the business, knowing them to be such, and that she professed to act for him, it may be inferred in general that the purchases were made on the husband's credit.[4] Where the separate business, however, is carried on against the husband's consent and without his concurrence, he assuredly is not liable.[5]

[1] Parker *v.* Simonds, 1 Allen, 258; Colby *v.* Lamson, 39 Me. 119; Trieber *v.* Stover, 30 Ark. 727; Tuttle *v.* Hoag, 46 Mo. 38.

[2] Parker *v.* Simonds, 1 Allen, 258. As to husband's liability on a lease, though professing to underlet for a wife's business, see Knowles *v.* Hull, 99 Mass. 562.

[3] Colby *v.* Lamson, 39 Me. 119.

[4] Oxnard *v.* Swanton, 39 Me. 125.

[5] Tuttle *v.* Hoag, 46 Mo. 38; Jenkins *v.* Flinn, 37 Ind. 349. See Smith *v.* Thompson, 36 Conn. 107, where the married woman had no power to trade as a *feme sole*.

In New York, as against her husband's creditors, the wife may make him managing agent, and let him conduct the business in her name, while she furnishes the capital from her own means and takes the profits to herself; paying the managing agent what she thinks best, without subjecting the stock in trade to his debts.[1]

Where a married woman manages a separate trade or business by agents, the usual doctrine of agency must apply. The wife cannot avoid the usual liabilities on the plea that she made her husband her agent.[2] The scope of the agency, too, must be considered as in other cases, and the agency, as actually conferred, is not the full test of responsibility for the agent's dealings with third parties; for those clothed with apparent authority may bind their principals as though really authorized.[3] In short, married women, as it is well observed, to the extent and in the matters of business in which they are

[1] Buckley *v.* Wells, 33 N. Y. 518. And see Sherman *v.* Elder, 24 N. Y. 381; Barton *v.* Beer, 35 Barb. 78; Abbey *v.* Deyo, 44 N. Y. 343; Hamilton *v.* Douglas, 46 N. Y. 318; Schoul. Hus. & Wife, § 314. All purchases or contracts of purchase for commencing or prosecuting the wife's separate business must have been made in good faith, and not as a means of fraudulently placing the husband's property beyond the reach of his creditors. Dayton *v.* Walsh, 47 Wis. 113. But the employment of her husband in carrying on her separate business of farming does not make him the wife's agent in the business, unless he contributed money or services as partner, *Ib.*; nor his employment as salesman in the wife's store, Ploss *v.* Thomas, 6 Mo. App. 157; or as operative or manager in his wife's mill, Cooper *v.* Ham, 49 Ind. 393. Proof that a husband signed notes for goods in a shop leased to him is not conclusive proof that the goods did not belong to the wife's separate business: Mason *v.* Bowles, 117 Mass. 86; for a husband might sign as an agent and render her business liable. Freiberg *v.* Branigan, 18 Hun, 344. But as to a judgment rendered against the agent himself, see Smiley *v.* Meyer, 55 Miss. 555.

But transactions which are tainted with fraud upon the rights of creditors and others must not be permitted to stand. Capital placed by a wife in her husband's hands, and by him so embarked in business with her assent that credit is obtained upon it, is not, with the increase, the wife's separate property as against his creditors who have trusted accordingly, but rather his property. Patton *v.* Gates, 67 Ill. 164; Kouskop *v.* Shontz, 51 Wis. 204. Or possibly like that of a firm in which both were partners. See § 169, *post.* A change in the mutual relations of the spouses regarding the business ought, on the usual principles of both agency and partnership, to be brought home to the knowledge of creditors with whom business relations continue uninterrupted. Bodine *v.* Killeen, 53 N. Y. 93.

[2] Porter *v.* Gamba, 43 Cal. 105.

[3] Bodine *v.* Killeen, 53 N. Y. 93.

by law permitted to engage, owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner as if they were unmarried. To the extent of their enlarged capacity to transact business as conferred by statute, they may be estopped by their acts and declarations, and made subject to all the presumptions which the law indulges against the other sex.[1] And while, in general, the husband's gift may sustain the wife's claim of profits accruing from her separate trade; yet the better opinion is, upon either equity or statute consideration, that a business carried on by a husband and wife in co-operation, his labor and skill uniting with hers, must be considered as his business so far as his creditors are concerned, and fail accordingly of protection for her especial benefit;[2] though it might, perhaps, be well ruled in some States, that there is a partnership whose liabilities should be adjusted on partnership principles; highly objectionable as the jurist may well regard all such partnerships upon principle.

§ 169. **Wife as Copartner with Husband or Others.** — As to all agencies and all partnerships, one rule may apply in adjusting rights as between themselves, and another as to creditors whose confidence has been invited. And, on the whole, it would still appear to be the general rule, notwithstanding the late statutes, that a wife may not, as against the world, become her husband's partner, nor even join her labor and capital to his in one and the same business enterprise.[3] In Massachusetts, while the statute permitted the wife to form a copartnership with third parties, this exception the court so strictly enforced, as to hold her transactions as a member of any firm in which her husband was interested as a partner utterly void, whether to her advantage or injury, inasmuch as a married woman cannot legally contract with her husband singly or jointly.[4] But under the New York statutes it is

[1] Bodine *v.* Killeen, 53 N. Y. 93; Parshall *v.* Fisher, 43 Mich. 529; Leland *v.* Collver, 34 Mich. 418.

[2] See National Bank *v.* Sprague, 5 C. E. Green, 13; Oxnard *v.* Swanton, 39 Me. 125; Cramer *v.* Reford, 2 C. E. Green, 383. But see Penn *v.* Whitehead, 17 Gratt. 503; Partridge *v.* Stocker, 36 Vt. 108; Schoul. Hus. & Wife, §§ 303, 315.

[3] Wilson *v.* Loomis, 55 Ill. 352; Montgomery *v.* Sprankle, 31 Ind. 113; Lord *v.* Parker, 3 Allen, 127.

[4] Lord *v.* Parker, 3 Allen, 127; Ed-

held that a husband and wife may not only enter into a valid partnership together for business, but carry it on under the name "A. & Co." (the "Co." representing the wife) without violating the law which forbids persons to transact business under fictitious names; and that hence they can sue and recover in their joint names for goods sold and delivered by their firm.[1]

By the wife's business copartnership with third persons, and particularly with those of the opposite sex apart from her husband, she entangles her separate property disadvantageously, and incurs the risk of personal affiliations, besides, quite perilous to domestic concord and the mutual confidence which marriage demands. In Massachusetts the legislature permitted a married woman to form a copartnership in business with third parties, though not with her husband; but, after some ten years' experience, repealed, in 1874, that permission.[2] Most other States deny her such a right as separate and exclusive of her husband's interest;[3] though in some parts of the Union such copartnerships are sustained,[4] and she is not unfrequently found connected with business firms as a partner in place of her deceased husband;[5] sometimes, too, he is her successor, or else participates with her and third persons in the concern.[6]

Where a married woman enters legally into a copartnership, she becomes personally liable, to the extent of her separate property, for the partnership debts, like any other partner.[7] But our latest decisions tend to protect the wife against copartnership liabilities.[8]

wards *v.* Stevens, 3 Allen, 315; Plumer *v.* Lord, 7 Allen, 481.

[1] Zimmerman *v.* Erhard, 8 Daly, 311. And so as to other States. See *Re* Kinkead, 3 Biss. 405: Schoul. Hus. & Wife, § 316; Camden *v.* Mullen, 29 Cal. 564; Reading *v.* Mullen, 31 Cal. 104; Atwood *v.* Meredith, 37 Miss. 635; Oglesby *v.* Hall, 30 Ga. 386.

[2] Todd *v.* Clapp, 118 Mass. 495. Such a law, not being interpreted retroactively, was held constitutional. *Ib.*

[3] See Bradford *v.* Johnson, 44 Tex. 381; Bradstreet *v.* Baer, 41 Md. 19; Howard *v.* Stephens, 52 Miss. 239.

[4] See Newman *v.* Morris, 52 Miss. 402.

[5] Preusser *v.* Henshaw, 49 Iowa, 41.

[6] Bitter *v.* Rathman, 61 N. Y. 512; Swasey *v.* Antram, 24 Ohio St. 87.

[7] Preusser *v.* Henshaw, 49 Iowa, 41; Newman *v.* Morris, 52 Miss. 402.

[8] See Swasey *v.* Antram, 24 Ohio St. 87; Parshall *v.* Fisher, 43 Mich. 529; Bitter *v.* Rathman, 61 N. Y. 512; Schoul. Hus. & Wife, § 318. See, as to

§ 170. **Civil-Law Doctrine of Separate Trade.** — By the Civil Code of France, the wife may carry on a trade independently of her husband.[1] So the wife may be a separate trader under the custom of Paris.[2] And a similar right is recognized by the laws of Spain and other European countries.[3] From the civil, rather than the common law, are derived those property rights of married women which are recognized in Louisiana, California, and others of the Southwestern States, originally colonized by the Spanish and French. Thus the Louisiana Code recognizes the capacity of the wife to carry on separate trade, or, as it is said, to constitute herself a public merchant, provided she act *bona fide* and have an active agency in the concern.[4]

enforcing trading liabilities against a wife, Schoul. Hus. & Wife, §§ 319, 320.

[1] Code Civil, art. 220; 1 Burge Col. & For. Laws, 219.

[2] 1 Burge Col. & For. Laws, 218.

[3] *Ib.* 226, 420, 698.

[4] La. Code, art. 128; Christensen *v.* Stumpf. 16 La. Ann. 50. And see Camden *v.* Mullen, 29 Cal. 564; Reading *v.* Mullen, 31 Cal. 104; Community Doctrine, *supra*, § 7.

How great the change which modern equity and legislation have wrought, and modern legislation especially, in marital rights and duties as defined by the common law, will further appear from the miscellaneous changes noticed in Schoul. Hus. & Wife, §§ 321–333, which see *passim*, also Appendix, with analysis of latest married women's acts. These changes, which concern contracts, torts, property of the wife, and suits by or against her, may be specified as chiefly relating: (1) to the wife's antenuptial debts; (2) to the wife's general disability to contract; (3) to the necessaries of wife and family; (4) to torts committed by the wife; (5) to torts committed upon the wife; (6) to torts or crimes committed by one spouse and affecting the other; (7) to the wife's property; (8) to actions by a married woman, her arbitration, &c.

To attempt a minute analysis of the married women's acts would require more space than our plan will permit. Nor would it profit the reader. The independent legislation of some thirty distinct communities, without uniformity of plan or principle, involving, as it does, the most interesting and yet the most perplexing of social problems, must necessarily produce results which cannot be reconciled. It is too early yet to generalize from the decisions. Even though the hand of innovation should be stayed for a while, and public attention centre in the work of blending these results into harmony, it would be many years before our courts, applying local codes and the traditions of the English common law and equity jurisprudence to the discordant mass of material before them, could hope to set up a consistent and thorough American system. As one of our own jurists well remarks, wherever the line may be drawn, it will be long before the public will understand and recognize the point where the power of a married woman to bind herself by her bargains ceases, and frauds upon the thoughtless and inconsiderate must often occur. Per Bell, C. J., in Ames *v.* Foster, 42 N. H. 381. The ultimate scope of all this legislation must, however, be either, regarding the wife as peculiarly exposed to coercion and subtle influ-

CHAPTER XIII.

ANTENUPTIAL SETTLEMENTS.

§ 171. **Nature of Marriage Settlements.** — Settlements are a useful contrivance for preserving estates intact in a family. As between husband and wife the word "settlement" is applied to their mutual contracts in reference to the property of one another, by means of which, under the protection of courts of equity (which favor, as did also the civil law, arrangements in recognition of property in the wife as well as the husband), they change and control the general rules of the marriage state. They cannot vary the terms of the conjugal relation itself; they cannot add to or take from the personal rights and duties of husband and wife; but they may essentially alter the interest which each takes in the property of the other, if they choose to enter into special stipulations for that purpose. These special stipulations may be either antenuptial or postnuptial; while, as we shall soon perceive, the two classes are more alike in name than substance, and the term "marriage settlements" is frequently applied to antenuptial settlements only.

§ 172. **Distinguished from Promises to Marry under Statute of Frauds.** — A distinction meets us at the outset between promises to marry and promises in consideration of marriage. The Statute of Frauds, § 4, requires that promises and agreements in consideration of marriage shall be "in writing, and signed by the party to be charged therewith, or some other

ence, if not mastery by main force from the natural necessities of her position in the conjugal partnership, if not the weakness of her sex, to afford that legal protection and shelter which she has always claimed, and which our law in a strait could never deny her; or else, as though no such necessities exist in a state of nature, but her disabilities have been rather created by municipal law, and enforced by tyrannical men, to treat her as *sui juris*, and make her bear the full responsibility of her own legal engagements, be they prudent or foolish, like one *discovert*.

person thereunto by him lawfully authorized." Yet a promise to marry is binding, although verbal.[1] It would strike any one (except perhaps a lawyer) that a promise by a woman to marry a man in consideration of his promising to marry her was an agreement made in consideration of marriage, but it is not.[2] Perhaps it is public policy which sustains the latter rather than the former contract without requiring a writing. Perhaps, too, this carries weight: that a promise to marry is merely a promise to enter into a certain relation, and therefore clearly interpreted by any court without the aid of written evidence, provided the promise be once proved; while the Statute of Frauds is found most convenient for clearly fixing mutual stipulations which might be varied in a thousand ways, and affect the property rights of the contracting parties accordingly. At all events, a promise to marry, whether verbal or written, affords a singular remedy for breach, one quite different from the remedies attending marriage settlements: namely, no right of specific performance, but always damages to the injured party.

§ 173. **Marriage the Consideration which supports Antenuptial Settlements.** — In antenuptial marriage settlements, or what are called "marriage settlements," the marriage affords a sufficient consideration. Hence a man cannot set aside an agreement in contemplation of marriage, on the plea that his wife's fortune fell short of his expectations; for, as Lord Hardwicke observed, it would be extremely mischievous to set aside marriage settlements upon such grounds.[3] It is the consideration of marriage, not the consideration of a corresponding fortune, which runs through the whole settlement or agreement, and supports every part of it, thus making marriage not only a high, but the highest consideration in fact known to the law.[4]

In this country the validity of marriage settlements is generally recognized; and it is well understood that almost any

[1] Macq. Hus. & Wife, 220; Cook *v.* Baker, 1 Stra. 34; Harrison *v.* Cage, 1 Ld. Raym. 386; Schoul. Hus. & Wife, § 44.

[2] See Smith on Contracts, 57.

[3] *Ex parte* Marsh, 1 Atk. 159.

[4] Ford *v.* Stuart, 15 Beav. 499; Nairn *v.* Prouse, 6 Ves. 752; Peachey Mar. Settl. 56.

bona fide and reasonable agreement, made before marriage, to secure the wife either in the enjoyment of her own property or a portion of that of her husband, whether during coverture or after his death, will be carried into execution in chancery.[1] "These marriage settlements," observes Chancellor Kent, "are benignly intended to secure to the wife a certain support in every event, and to guard her against being overwhelmed by the misfortunes or unkindness or vices of her husband. They usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents; and, if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created."[2] And marriage is of itself pronounced in the supreme court of this land to be not only a valuable consideration to support a marriage settlement, "but a consideration of the highest value."[3]

§ 174. **How far this Support extends.** — But this rule must be taken with some caution. The marriage consideration supports every provision with regard to the husband, the wife, and the issue. As for marriage itself, the marriage of persons formerly in loose cohabitation furnishes good consideration;[4] and even perhaps a void or illegal marriage, provided that marriage was contracted with honest conjugal intent, and particularly where the question affects only their respective interests.[5] The consideration is held also to extend to stepchildren by a former marriage.[6] It does not, however,

[1] Stilley *v.* Folger, 14 Ohio, 610; 2 Kent Com. 163; 2 U. S. Eq. Dig. Hus. & Wife, 22–30; English *v.* Foxall, 2 Pet. 595; Hunter *v.* Bryant, 2 Wheat. 32; Tarbell *v.* Tarbell, 10 Allen, 278; Skillman *v.* Skillman, 2 Beasl. 403; Cartledge *v.* Cutliff, 29 Ga. 758; Albert *v.* Winn, 5 Md. 66; Snyder *v.* Webb, 3 Cal. 83; Smith *v.* Chappell, 31 Conn. 589.

An estate may be limited to an unmarried woman's separate use, even where no particular marriage is contemplated. Schoul. Hus. & Wife, § 198; Haymond *v.* Jones, 33 Gratt. 317.

[2] 2 Kent Com. 165.

[3] Per Story, J., Magniac *v.* Thompson, 7 Pet. 348. And see Armfield *v.* Armfield, 1 Freem. Ch. 311.

[4] Herring *v.* Wickham, 29 Gratt. 628.

[5] Even in England, upon lapse of time, a settlement deed was allowed to stand where a widower had married his deceased wife's sister. Ayers *v.* Jenkins, L. R. 16 Eq. 275.

[6] Michael *v.* Morey, 26 Md. 239; Gale *v.* Gale, 6 Ch. D. 144; Vason *v.* Bell, 53 Ga. 516. But see Price *v.* Jenkins, 4 Ch. D. 483. Cf. Ardis *v.* Printup,

always extend to collaterals,[1] though Sir Matthew Hale and others held formerly that it would, maintaining that the influence of the marriage consideration extended to purchasers generally.[2] Nor are covenants in favor of strangers supported by the marriage consideration unless specially provided for.[3]

The consideration of marriage will support a settlement against creditors, even prior ones; this, too, it would appear, though the parties both knew of the husband's indebtedness, so long as the provisions of the settlement are not grossly out of proportion to his station and circumstances;[4] and so, too, where the party to be benefited thereby was implicated in no fraud upon the other's creditors, even though that provision be unreasonably large.[5] But if it appear that the celebration of marriage is part of a scheme between the marrying parties to defraud and delay creditors, such settlement will not be allowed to protect the property against just claims of the latter.[6] Where fraud has been committed by husband

39 Ga. 648, with Wollaston *v.* Tribe, L. R. 9 Eq. 44, as to children of a future marriage.

[1] Peachey Mar. Settl. 58, 60, and cases cited; Davenport *v.* Bishop, 1 Phil. 701; Barham *v.* Earl of Clarendon, 10 Hare, 133; Ford *v.* Stuart, 15 Beav. 505; Cotterell *v.* Homer, 13 Sim. 506; Wollaston *v.* Tribe, L. R. 9 Eq. 44.

[2] Jenkins *v.* Kemis, 1 Ch. Cas. 103; 1 Lev. 152.

[3] Sutton *v.* Chetwynd, 3 Mer. 249, per Sir Wm. Grant; Sugden Law Prop. 153; Peachey Mar. Settl. 61.

[4] Campion *v.* Cotton, 17 Ves. 272; *Ex parte* McBurnie, 1 De G. M. & G. 446; Ramsay *v.* Richardson, Riley Ch. 271; Armfield *v.* Armfield, 1 Freem. Ch. 311; Jones's Appeal, 62 Penn. St. 324; Brunnel *v.* Witherow, 29 Ind. 123; Barrow *v.* Barrow, 2 Dick. 504; Cochran *v.* McBeath, 1 Del. Ch. 187; Credle *v.* Carrawan, 44 N. C. 422.

[5] Collaterals are favorably regarded in Neves *v.* Scott, 9 How. (U. S.) 196; *ib.* 13 How. 268; Schoul. Hus. & Wife, § 349, and cases cited. Where no fraud upon the husband's creditors can be charged on the woman, she may hold as a purchaser for value against the husband's prior creditors, even though the settlement upon her embraced the husband's whole estate, and the marrying parties had been cohabiting while single, and had illegitimate children. Herring *v.* Wickham, 29 Gratt. 628. This is an extreme case, and perhaps some other States would not extend the rule so far. But it finds strong support from the Supreme Court of the United States in a case decided in 1881, which upheld the settlement of a large amount of real estate, in consideration of marriage, by an insolvent debtor upon the woman who accepted him, notwithstanding the latter knew he was financially embarrassed. Prewit *v.* Wilson, 103 U. S. Supr. 22. See comments, Schoul. Hus. & Wife, § 349. And see Kevan *v.* Crawford, 6 Ch. D. 29.

[6] Columbine *v.* Penhall, 1 Sm. & Gif. 228; Goldsmith *v.* Russell, 5 De G.

and wife in reference to property embraced in the terms of a settlement, the rights of a creditor with insufficient notice are sometimes upheld as against themselves; and a wife's settlement of her own property has been so far set aside as to secure payment of her antenuptial debt to the creditor.[1]

§ 175. **Settlement Good in Pursuance of Written Agreement.** — If an agreement be made in writing before marriage, for the settlement of an estate, the settlement, although made after marriage, will be deemed valuable.[2] This is a well-settled rule, and should be constantly borne in mind.

There are *dicta* to the effect that a settlement after marriage, reciting a parol agreement before marriage, is not fraudulent against creditors, provided the agreement had actual existence; but this point has never been distinctly decided in England; and some late authorities appear to doubt its correctness.[3] The payment of money would, however, make a good consideration for such a settlement as against subsequent creditors.[4] The language of the Statute of Frauds has a material bearing upon all such cases. Yet very informal agreements are often sustained, rather on liberal than technical construction, the court taking into consideration the fact that marriage had taken place, or other acts been performed, on the strength of the promise.[5] The disposition of equity courts in the United States is favorable to settlements after marriage in pursuance of some informal prior agreement, particularly as relates to personal property and as between the spouses themselves. Other considera-

M. & G. 555; Peachey Mar. Settl. 63; Simpson *v.* Graves, Riley Ch. 232.

[1] Sharpe *v.* Foy, L. R. 4 Ch. 35; Smith *v.* Chirrell, L. R. 4 Eq. 390; Chubb *v.* Stretch, L. R. 9 Eq. 555; Obermayer *v.* Greenleaf, 42 Mo. 304; Brame *v.* McGee, 46 Ala. 170.

[2] Reade *v.* Livingston, 3 Johns. Ch. 481; Finch *v.* Finch, 10 Ohio St. 501; Izard *v.* Izard, 1 Bailey Ch. 228; Davidson *v.* Graves, Riley Ch. 219; Satterthwaite *v.* Emley, 3 Green Ch. 489; Rogers *v.* Brightman, 10 Wis. 55; Peachey Mar. Settl. 63; Sugd. Vend. & Purch. 13th ed. 590; Macq. Hus. & Wife, 257.

[3] See Peachey Mar. Settl. 63; Lassence *v.* Tierney, 1 Mac. & Gor. 571; Warden *v.* Jones, 5 W. R. 447. And see Babcock *v.* Smith, 22 Pick. 61; Simpson *v.* Graves, Riley Ch. 232.

[4] Stillman *v.* Ashdown, 2 Atk. 478; Brown *v.* Jones, 1 Atk. 189. And see Butterfield *v.* Heath, 15 Beav. 414.

[5] See Livingston *v.* Livingston, 2 Johns. Ch. 481; Resor *v.* Resor, 9 Ind. 347; Brooks *v.* Dent, 1 Md. Ch. 523; West *v.* Howard, 20 Conn. 581.

tions, such as forbearance to sue, or the fulfilment, in return, of terms prejudicial, might intervene.[1] A mere oral agreement between the intended husband and wife, followed by marriage and a continued recognition by acts, especially in connection with such other consideration, is held sufficient for the wife's favor in some late American cases, as between the parties and those claiming under them.[2]

§ 176. **Form of Antenuptial Settlements.** — With respect to the form of marriage settlements it may be generally observed that equity pays no regard to the externals, but considers only the substantial intention of the parties; and hence articles or an agreement will be binding between husband and wife without the intervention of trustees; for here the husband himself may be bound to act as trustee.[3] And hence the signature of the wife to an instrument or an indenture deed is by no means indispensable in order that her rights upon marriage consideration be sustained.[4]

§ 177. **Marriage Articles.** — In this connection the use of the term "marriage articles" is properly to be noticed.

[1] Riley *v.* Riley, 25 Conn. 154; Bradley *v.* Saddler, 54 Ga. 681. See, as to the like English practice, Peachey Mar. Settl. 74, 87; Macq. Hus. & Wife, 234; Hammersley *v.* De Biel, 12 Cl. & Fin. 45; Lassence *v.* Tierney, 1 Mac. & Gor. 571. The numerous *dicta* in all such cases serve rather to obscure than illustrate the principle.

[2] See Schoul. Hus. & Wife, § 350, and cases cited; *post*, § 179.

[3] Peachey Mar. Settl. 65; Macq. Hus. & Wife, 242; Logan *v.* Goodall, 42 Ga. 95. But see Dillaye *v.* Greenough, 45 N. Y. 438.

A strong instance of the liberality of the equity courts in this respect was afforded in an early decision by Lord Keeper Wright. The intended husband gave the intended wife a bond conditioned to leave her £1,000 if she should survive him. They married, and of course the bond became void at law. But it was held that in equity this should subsist as an antenuptial agreement. Acton *v.* Pierce, 2 Vern. 480. Even in law a bond, with conditions properly expressed, may be enforced against the husband to the extent of the penalty therein named; yet equity, regarding the contract as one for specific performance, will not confine the remedy of the injured party to the penal sum named in the bond; but, enforcing the real obligations of the bond, will give, if need be, thirty times that sum to her who married on the strength of it. Such is the advantage of equity over the law. See Prebble *v.* Boghurst, 1 Swan. 309, before Lord Eldon, cited in Macq. Hus. & Wife, 243 *et seq.*; Cannel *v.* Buckle, 2 P. Wms. 242; Rippon *v.* Dawding, Ambl. 565; Peachey Mar. Settl. 65. Bonds have been frequently enforced in this country as constituting a marriage settlement. Aucker *v.* Levy, 3 Strobh. Eq. 197; Hunter *v.* Bryant, 2 Wheat. 32; Freeman *v.* Hill, 1 Dev. & Bat. Eq. 389; Baldwin *v.* Carter, 17 Conn. 201.

[4] Cochran *v.* McBeath, 1 Del. Ch. 187.

"When promises and agreements in consideration of marriage," says Mr. Macqueen, "are meant to become the ground-work of settlements, they are called marriage articles. They are often drawn up hastily, and signed on the eve of the nuptial ceremony from want of time to prepare a final deed; which, however, when ultimately executed, if it be in strict conformity with the articles, will supersede them."[1] The American rule is favorable to marriage articles, although unskilfully drawn, so long as they are *bona fide* articles, and the party marrying upon their faith had good reason to rely upon them as such.[2] Any settlement made after marriage, in pursuance of marriage articles, or what may be construed as such, receives the full support of the marriage consideration, and must prevail accordingly against creditors, purchasers, and each of the married parties.

Letters or a correspondence before marriage may establish an antenuptial settlement where they sufficiently furnish the terms of the agreement. And so, too, may they constitute marriage articles and support a settlement made in pursuance of their terms.[3] But the authenticity of such correspondence should be well established, so easy is such proof manufactured to suit emergencies: and certainly where the contest is between the married pair and a husband's creditors, the true date of the letters should be proved, or else that they were duly received before the marriage.[4] Nor will performance be decreed, unless it can be gathered, from a fair interpretation of the letters, that they imported a concluded agreement, and induced the marriage; nor if it be doubtful whether what passed was not mere negotiation, or a gratuitous offer by the one, which the other never accepted nor meant to rely upon.[5]

[1] Macq. Hus. & Wife, 246.

[2] Neves *v.* Scott, 9 How. 196; Hooks *v.* Lee, 8 Ired. Eq. 157; Rivers *v.* Thayer, 7 Rich. Eq. 136; Kinnard *v.* Daniel, 13 B. Monr. 496; Montgomery *v.* Henderson, 3 Jones Eq. 113; Smith *v.* Moore, 3 Green Ch. 485; Potts *v.* Cogdell, 1 Desaus. 456.

[3] Logan *v.* Wienholt, 1 Cl. & Fin. 611; Hammersley *v.* De Biel, 12 Cl. & Fin. 45; Moorhouse *v.* Colvin, 15 Beav. 349; Kinnard *v.* Daniel, 13 B. Monr. 496.

[4] Kinnard *v.* Daniel, 13 B. Monr. 496; Montgomery *v.* Henderson, 3 Jones Eq. 113.

[5] Fowle *v.* Freeman, 9 Ves. 315; Card *v.* Jaffray, 2 Sch. & Lef. 384; Chambers *v.* Sallie, 29 Ark. 407.

§ 178. **Marriage Settlements by Third Persons.** — Promises made in consideration of the marriage by a third party, such as the wife's father, may afterwards be enforced against him, as (in such an instance) by the husband. But it must appear that the latter knew of the promise, and that it entered as an ingredient into the marriage; and the husband cannot, upon finding, after marriage, that his wife, while single, had received a letter from her father, promising a certain allowance, hold the latter to specific performance.[1] The promise of a third party may be for the wife's benefit; or it may be for the mutual benefit of the married parties, and enforceable accordingly.[2]

Courts of equity have frequently refused, however, to enforce marriage agreements on the ground of their being inconsistent, uncertain, and unintelligible;[3] and particularly is this found true of loose expressions contained in letters written by relatives of the married parties, upon which the attempt is made to render them chargeable when the marriage was not thereby induced.[4]

§ 179. **Effect of Statute of Frauds.** — Under the English Statute of Frauds, and similar enactments in various American States, promises "in consideration of marriage" are required to be in writing; and hence an oral promise to settle property upon an intended spouse is void.[5] Cases have arisen, however, under the Statute of Frauds, where the marriage agreement had been reduced to writing, but not signed, and yet letters passed afterwards between the parties,

[1] Ayliffe *v.* Tracy, 2 P. Wms. 66; Madox *v.* Nowlan, Beatty, 632.

[2] Thus, in a recent English case the estate of a father was held bound by his written statements of intention to settle the whole of his property upon his daughter, on the strength of which she married; and this, notwithstanding the father, being at the time a widower, remarried afterwards and left a widow. Coverdale *v.* Eastwood, L. R. 15 Eq. 121; a harsh case, truly.

[3] Franks *v.* Martin, 1 Eden, 309; Kay *v.* Crook, 3 Jur. N. S. 107; Peachey Mar. Settl. 68; Quinlan *v.* Quinlan, Hayes & Jones, Ir. Rep. 785; Maunsell *v.* White, 1 Jo. & Lat. 539.

[4] Hincks *v.* Allen, 28 W. R. 533. As to carrying out the wishes of a third party respecting property devised so as to settle it upon marrying, see Teasdale *v.* Braithwaite, 5 Ch. D. 630.

[5] Tawney *v.* Crowther, 3 Bro. C. C. 263; Coles *v.* Trecothick, 9 Ves. 250; Lloyd *v.* Fulton, 91 U. S. Supr. 479; Flenner *v.* Flenner, 29 Ind. 569; Henry *v.* Henry, 27 Ohio St. 121.

referring to the agreement, which sufficed to establish it. In general, a letter which contains the terms of an agreement, or refers to another paper which specifies the terms, is sufficient to take the contract out of the Statute of Frauds.[1]

§ 180. **General Requirements; Trustee, &c.** — Antenuptial agreements are so liable to misapprehension and fraud, that they will not be enforced in equity unless the court is satisfied that they were made, and that the marriage consideration really entered into the contract.[2] If in the form of a writing, due delivery should appear; though if the written contract be produced from the proper custody, and its execution proved, proper delivery is readily presumed.[3] Where duly made and delivered, such settlements may be cancelled; but whether a mutilated instrument was intentionally cancelled or not is matter for proof.[4]

Under modern rules of separate use, a valid marriage settlement may be made without the designation of a trustee, though in such contracts, when drawn up with due formality, trustees are commonly interposed outside the marriage relation, however, who hold the legal title; and such is unquestionably the more prudent arrangement.[5]

§ 181. **Secret Settlement before Marriage; Fraud of a Spouse.** — A secret settlement or voluntary transfer in whole or in part of her property made by a woman upon third persons, while engaged, and contemplating marriage, is liable to be set aside in equity as a fraud upon the marital rights of her intended husband, at the husband's instance, when he learns of it. *Prima facie*, her transactions as a *feme sole* with refer-

[1] Hammersley *v.* De Biel, 12 Cl. & Fin. 45; Moorhouse *v.* Colvin, 15 Beav. 349; Peachey Mar. Settl. 67; 3 Bro. C. C. 263.

[2] Coles *v.* Trecothick, 9 Ves. 250; Franks *v.* Martin, 1 Eden, 309; Kay *v.* Crook, 3 Jur. N. S. 107; Montgomery *v.* Henderson, 3 Jones Eq. 113; Peachey Mar. Settl. 68; Kinnard *v.* Daniel, 13 B. Monr. 496.

[3] In Smith *v.* Moore, 3 Green Ch. 485, the document being found in the husband's possession after his death, execution proved, and also his recognition during his lifetime, due delivery was presumed.

[4] Barclay *v.* Waring, 58 Ga 86. See summary of doctrine in Bold *v.* Hutchinson, 20 Beav. 259; Schoul. Hus. & Wife, § 355.

[5] Cochran *v.* McBeath, 1 Del. Ch. 187; Peachey Mar. Settl. 260; Haymond *v.* Lee, 33 Gratt. 317; Schoul. Hus. & Wife, § 356.

ence to her own property are valid both at law and in equity; it is only because of the fraud that her husband can afterwards obtain relief against them; yet the English courts have gone far in discountenancing all conveyances made by the intended wife in derogation of the property rights of her intended husband, where made without notice to him.[1] The secrecy of the proceeding is a material element, from which fraud will be inferred.[2]

The same general doctrine has been repeatedly declared in the courts of this country; and secret and voluntary conveyances, made by a woman contemplating marriage, may be set aside on the husband's subsequent application as a fraud upon his marital rights,[3] under the same qualification that the intended spouse was thereby defrauded.[4]

If the wife's transfer or conveyance to another, under such circumstances, be without valuable consideration to herself, there is the less reason why equity should uphold it;[5] and if it it be in plain derogation of her own interests, as, for instance, to some insolvent relative to hold in trust for her, or so as to suggest that fraud or coercion was practised upon her, it is for the common nuptial interests that courts of chancery repudiate the arrangement altogether.[6] By virtue

[1] Peachey Mar. Settl. 142, and cases cited; 11 C. B. 1035; St. George *v.* Wake, 1 Myl. & K. 618; Macq. Hus. & Wife, 36; England *v.* Downes, 2 Beav. 522; 2 Ch. Rep. 81; 1 Eq. Cas. Ab. 59, pl. 1.

[2] England *v.* Downes, 2 Beav. 522; Macq. Hus. & Wife, 36. The husband must have been kept in ignorance of the transaction up to the moment of marriage. For, as Lord Chancellor Brougham once observed, if a man, knowing what has been done, still thinks fit to marry the lady, he cannot be permitted to allege afterwards that he has been deceived. St. George *v.* Wake, 1 Myl. & K. 610. Actual concurrence on the part of the intended husband in his wife's settlement will be even more conclusive against him; and, even though he were a minor, will preclude all subsequent allegations of fraud on the marital right. 2 Bro. C. C. 545. It is the usual practice with English conveyancers at the present day to make the intended husband a party to all instruments executed by the intended wife in contemplation of or during a treaty of marriage. Peachey Mar. Settl. 155.

[3] 2 Kent Com. 174, 175, and notes, 12th ed.; Spencer *v.* Spencer, 3 Jones Eq. 404; Tucker *v.* Andrews, 13 Me. 124, 128; Williams *v.* Carle, 2 Stockt. 543; Freeman *v.* Hartman, 45 Ill. 57; Baker *v.* Jordan, 73 N. C. 145; Hall *v.* Carmichael, 8 Baxt. 211.

[4] Schoul. Hus. & Wife, § 357; Gregory *v.* Winston, 23 Gratt. 102.

[5] Baker *v.* Jordan, 73 N. C. 145; Fletcher *v.* Ashley, 6 Gratt. 332.

[6] Hall *v.* Carmichael, 8 Baxt. 211.

of late statutory changes, tending to relieve a husband of his wife's antenuptial debts, or of other common-law burdens, on her account, the husband may sometimes stand in equity on the stronger footing of a defrauded creditor, where he seeks to have the secret conveyance of his affianced set aside in his favor.[1]

A corresponding rule as to fraud would, doubtless, apply to a husband, who, before marriage, had made a secret transfer or conveyance of his own property to his wife's injury; not, however, without regard to the difference which subsists at law between their marital rights in each other's property.[2] Indeed, it is sometimes said that any designed and material concealment ought to avoid an antenuptial contract at the will of the party who has been thereby injured.[3]

§ 182. **Reforming Marriage Settlements; Portions, &c.** — Marriage articles, to make a settlement of real property, should be drawn up only in extreme cases; though, in the case of personalty, more latitude may be allowed; and when drawn up they should leave as little to construction as possible. Yet marriage articles are frequently prepared in great haste, and many questions must necessarily arise as to the intention of the parties; these the courts of equity endeavor to meet by adopting the intention of the parties as their true guide, and taking it for granted that the articles are merely minutes which the settlement may explain more at large, but which are not to be literally followed.[4] The general rule as to reforming settlements framed upon antenuptial articles is thus laid down by Lord Chancellor Talbot:[5] "Where articles are entered into before marriage, and settlement made

[1] Westerman *v.* Westerman, 25 Ohio St. 500. But see Powell *v.* Manson, 22 Gratt. 177.

[2] See Leach *v.* Duvall, 8 Bush, 201; Gainor *v.* Gainor, 26 Iowa, 337. Lapse of time and other circumstances may remove any presumption of fraud or unfairness on his part. Butler *v.* Butler, 21 Kan. 521.

[3] Kline *v.* Kline, 57 Penn. St. 120.; Kline's Estate, 64 Penn. St. 122.

[4] Peachey Mar. Settl. 89–97; Macq. Hus. & Wife, 257; Trevor *v.* Trevor, 1 P. Wms. 631; Blandford *v.* Marlborough, 2 Atk. 545; Rochfort *v.* Fitzmaurice, Dru. & War. 18. But see Breadalbane *v.* Chandos, 2 Myl. & Cr. 711.

[5] Legg *v.* Goldwire, Forrester, 20; Macq. Hus. & Wife, 259.

after marriage, differing from the articles, this court will set up the articles against the settlement." That is to say, the court will order the settlement to be reformed.[1]

§ 183. **Equity corrects Mistakes, or sets aside; Fraud and Improvidence.** — Mistakes in marriage settlements, either through error or fraud, will in general be corrected in equity; the principle being that the parties are to be placed in the same situation in which they would have stood if the error to be corrected, or the fraud, had not been committed.[2] Owing, moreover, to the confidential relation which subsists between the parties, an antenuptial contract which appears to have been unfairly procured will be set aside.[3] Equity, moreover, sometimes refuses to enforce an antenuptial settlement, as between husband and wife, not only because of its fraudulent character as regards the one or the other party, but on the ground that it is improvident;[4] yet relief of this sort is rarely afforded, and especially so where a third party, or the husband, not the wife, seeks it.[5] And while the intended wife may, perhaps, in an extreme case, be relieved from an antenuptial contract which bears very harshly upon her prop-

[1] Legg *v.* Goldwire, Forrester, 20. See Peachey Mar. Settl. 135; Bold *v.* Hutchinson, 2 Jur. N. S. 97; 5 De G M. & G. 567. As to portions for children, &c., see Schoul. Hus. & Wife, § 359; 1 Atk. 522; Wallace *v.* Wallace, 82 Ill. 430; Russell *v.* St. Aubyn, L. R. 2 Ch. D. 398.

And curiously enough in an English case under this head, though the settlement followed the precise words of the marriage articles, the court reformed it, in order to carry out the actual intention of the parties. West *v.* Errissey, 2 P. Wms. 350.

Marriage articles under which parties agree to make a settlement and yet fail to do so, may, apart from the partial performance which marriage might be said to establish, afford one the right to damages as against the other. Jeston *v.* Key, L. R. 6 Ch 610.

[2] Rooke *v.* Lord Kensington, 2 Kay & Johns. 770; Peachey Mar. Settl. 565, 576; Sanderson *v.* Robinson, 6 Jones Eq. 155; Love *v.* Graham, 25 Ala. 187; Walker *v.* Armstrong, 2 Jur. N. S. 962; Brown *v.* Bonner, 8 Leigh, 1; Cook *v.* Fearn, 27 W. R. 212; Brown *v.* Brown, 31 Gratt. 502; Russell's Appeal, 75 Penn. St. 269. Correction made after the death of a spouse, in Burge *v.* Burge, 45 Ga. 301.

[3] Pierce *v.* Pierce, 71 N. Y. 154; Daubenspeck *v.* Biggs, 71 Ind. 255; Pond *v.* Skeen, 2 Lea, 126; Russell's Appeal, 75 Penn. St. 269.

[4] Everitt *v.* Everitt, L. R. 10 Eq. 405; Dillaye *v.* Greenough, 45 N. Y. 438.

[5] As to construction of antenuptial settlements, see Schoul. Hus. & Wife, § 361. Such settlements may renounce legal rights of the survivor in the estate of the spouse first dying. *Ib.* § 362. Or provide for settling after-acquired property. *Ib.* § 364.

erty rights, as though defrauded and deceived in the arrangement, there is no doubt that where she is of competent age she may bargain away her rights quite extensively under a marriage contract, as her husband likewise could have done; provided, of course, that her deliberate intention to do so be made manifest; and in this state of the law it certainly becomes a matter of serious question what these fundamental property rights may be which spouses ought not reciprocally to relinquish.[1]

CHAPTER XIV.

POSTNUPTIAL SETTLEMENTS; GIFTS AND GENERAL TRANSACTIONS BETWEEN SPOUSES.

§ 184. **Postnuptial Settlements distinguished from Antenuptial; Gifts between Spouses.** — The important distinction between settlements before and settlements after marriage is that, while the former have the marriage consideration to support them, the latter are without it.[2] The term "postnuptial settlements," then, must not confuse the reader's mind. We use the language of the text-writers without meaning to imply that it is appropriate, or that antenuptial and postnuptial set-

[1] Yeaton *v.* Yeaton, 4 Ill. App. 579. Such reservations, however, as, *e. g.*, to dispose by will, if made, must be respected. Bishop *v.* Wall, 3 Ch. D. 194; Rogers *v.* Cunningham, 51 Ga. 40; Russell's Appeal, 75 Penn. St. 269; Reynolds *v.* Brandon, 3 Heisk. 593.

As to breach and forfeiture of rights under a settlement, see Schoul. Hus. & Wife, § 368. Marriage settlements are very common in England, among parties possessed of large means; not generally so in this country, although many are made in the Southern States and elsewhere. The American policy is to dispense with trusts, and place a married woman's separate property in her own absolute keeping. Yet marriage settlements might often be well resorted to in order to equalize the burdens and privileges of matrimony, while our local legislation remains in its present crude condition. If settlements of property are made to the wife's separate use, the usual equitable rules apply, as to making the property liable for her debts and engagements.

The local registry system in the United States raises questions of constructive notice, as to marriage settlements and the property embraced therein. Schoul. Hus. & Wife, § 369.

[2] *Supra*, § 172; Lannoy *v.* Duke of Athol, 2 Atk. 448.

tlements constitute two branches of one general subject. On the contrary, postnuptial settlements are usually nothing more nor less than gifts of real or personal property, or of both, between husband and wife, which equity places, notwithstanding the disabilities of coverture, upon the footing of other gifts.[1] Furthermore, it should be remembered that formal settlements made between parties in the marriage state, in pursuance of articles or memoranda signed before marriage, are not technically postnuptial settlements (as the name itself would seem to indicate); for the settlement relates back to the antenuptial stipulations, however loosely these may have been drawn up, and it is protected by the marriage consideration, like all other antenuptial contracts.

But though, for want of consideration, postnuptial settlements are deemed voluntary, yet, like other voluntary transactions, they will be valid and binding, so far as the parties are concerned, and can only be impeached as fraudulent upon others. Postnuptial settlements, therefore, must be viewed in two different aspects: (1) as between the married parties and the creditor or purchasers of either; (2) as between husband and wife themselves. These we shall consider in order.

§ 185. **Postnuptial Settlements as to Creditors and Purchasers; Statutes 13 Eliz. and 27 Eliz.** — There are two English statutes which control this subject, as concerns creditors and purchasers, to a great extent, wherever the husband makes a postnuptial settlement upon his wife and offspring. The first is that of 13 Eliz. c. 5, in favor of creditors; the second that of 27 Eliz. c. 4, in favor of purchasers; the one being directed against fraudulent conveyances of all property with intent to defeat or delay creditors; the other against fraudulent or voluntary conveyances of lands designed to defeat subsequent purchasers. These statutes, Lord Mansfield said, cannot receive too liberal a construction or be too much

[1] "Gift," in the more technical sense, concerns personal property, but we use the word here in its wider sense. 2 Schoul. Pers. Prop. 55.

extended in suppression of fraud.[1] The bankrupt acts are material to consider in the former connection.

§ 186. **Same Subject; Statute 13 Eliz.; Bankrupt Acts.** — As to the first of these statutes, it is held that, if a man who is indebted conveys property for the use of his wife and children, or in trust for their benefit, such a conveyance is subject to the statute prohibition, inasmuch as the consideration, although good between the parties themselves, is not *bona fide* as regards creditors.[2] But a voluntary deed is good as against subsequent creditors; and there can be nothing inequitable in a man's making a voluntary conveyance to a wife, child, or even a stranger, if it be not at the time prejudicial to the rights of third persons, or in furtherance of some design of future fraud or injury to them.[3] The question of fraudulent intent is the real point at issue. And as to fraud upon future creditors, it has been said that while an instrument might be executed with the purpose of defrauding them, it is not a thing very likely to happen.[4] The property which may be recovered by creditors does not embrace property which is exempt from execution; for the creditors have no concern with anything except assets, actual or possible, for the payment of their debts.[5] This was formerly a matter of dispute; but it is now apparently set at rest.

The statute of 13 Eliz. c. 5, is generally recognized throughout the United States; in some cases having been formally re-enacted; in others, claimed to be part of the common law transported hither by the first settlers; and hence gifts of goods and chattels, as well as voluntary conveyances of lands, by writing or otherwise, are void when made with intent to delay, hinder, and defraud creditors, even though the gift or conveyance be to wife and children.[6] For it is a maxim, both

[1] Cowp. 434; Peachey Mar. Settl. 189.

[2] Goldsmith *v.* Russell, 5 De G. M. & G. 547; Peachey Mar. Settl. 191.

[3] Holloway *v.* Millard, 1 Madd. 414; Peachey Mar. Settl. 192.

[4] Jenkyn *v.* Vaughan, 25 L. J. Eq. 339; Holmes *v.* Penney, 3 Kay & Johns. 102. See further, Schoul. Hus. & Wife, § 373, and cases cited; Jac. 552; Peachey Mar. Settl. 195; 1 Atk. 93; Turnley *v.* Hooper, 2 Jur. N. S. 1081; French *v.* French, 6 De G. M. & G. 95.

[5] Peachey Mar. Settl. 199 *et seq.*; 1 Story Eq. Juris. § 410. See 2 Kent Com. 443, *n.*, 12th ed.

[6] 2 Kent. Com. 440, 441, and cases cited; Bayard *v.* Hoffman, 4 Johns. Ch.

at the civil and common law, that the claims of justice shall precede those of affection.[1] And in general the rule appears to be co-extensive with the fraud in this country as in England.

But it must be admitted the principle is not stated with equal precision in all the States; and while some cases doubtless proceed upon the doctrine that the voluntary gift fails because there is an intent to hinder and defraud, others again seem to rest upon the mere existence of actual creditors whose rights are thereby impaired or prejudiced. It is not within our province to treat of this subject in its general bearings, as in gifts between man and man, but so far as the American decisions concern gifts between husband and wife, we shall presently give the results somewhat at length.[2] According to the modern current of American authorities, mere indebtedness at the time of a settlement is only presumptive proof of fraud, which may be explained or rebutted; and it must also be shown that the husband was insolvent, or that the settlement directly tended to impair the rights of creditors.[3] The language of the statutes in some States contributes to the confusion which prevails as to the correct legal doctrine on this whole subject. Furthermore, our registry system places the law in a somewhat different footing from that prevalent in England, in all settlements, as we noticed in the preceding chapter.[4]

Voluntary settlements, in England, are likewise affected by the bankrupt acts, which are intimately connected with the statute of Elizabeth.[5] Here questions arise as to what acts amount to a contemplation of bankruptcy; and what constitutes a fraudulent preference; and these we need not here discuss. But it should be observed that the husband cannot

450; Montgomery *v.* Tilley, 1 B. Monr. 157; Reade *v.* Livingston, 3 Johns. Ch. 481; Pinney *v.* Fellows, 15 Vt. 525; Simpson *v.* Graves, Riley Ch. 232; Sexton *v.* Wheaton, 8 Wheat. 229; 1 Am. Lead. Cas. 1.

[1] Cicero, de Off. I. 14, cited in 2 Kent Com. 441.

[2] See 2 Kent Com. 440 *et seq.*; 4 *ib.* 463 *et seq.*, where the subject is discussed at length, with citations from American cases; *post*, § 187, note, with American citations as to creditors and purchasers; Schoul. Hus. & Wife, § 374.

[3] *Post*, note, § 187.

[4] *Supra*, § 183, *n.*

[5] Peachey Mar. Settl. 210 *et seq.*

bestow his property upon his wife, conditional upon his future bankruptcy or insolvency; yet, that third persons may, by voluntary conveyance, settle property to the wife's separate use, free from all control of her husband; or in trust to pay the income to the husband for life, "or until he should become a bankrupt," and after that to the wife's separate use.[1] In the former case the transaction would be simply an artifice of the husband to evade the bankrupt laws; in the latter, a third person parts with his own property, and makes his own terms as to its final disposition, as he has a right to do.[2] Our national bankruptcy system, as lately existing, also affected the doctrine of fraudulent conveyances in the United States.[3] With the Bankrupt Act repealed, however, this whole subject becomes regulated by State insolvent laws, which are far from uniform in their scope and purpose. As to artifices by a husband for keeping his own property under his own control, subject to its divestment in his wife's favor upon his bankruptcy, the American rule, like the English, discountenances them.[4]

§ 187. **Same Subject; Stat. 27 Eliz.** — Settlements as concerns the right of creditors and purchasers are also affected by the statute of 27 Eliz. c. 4. This statute, too, is to be considered as part of the common law brought to this country by our ancestors; though not generally adopted here to the full extent of the English equity decisions.[5] It provides that all conveyances of lands, made with the intent to defraud and deceive purchasers, shall, as against them, be utterly void. The statute has no application whatever to personal estate.[6]

The English doctrine is that a voluntary conveyance, though for a meritorious purpose, shall be deemed to have

[1] Manning *v.* Chambers, 1 De G. & Sm. 282; Sharp *v.* Cosserat, 20 Beav. 473. Provisions for children are liable to this objection.

[2] Ware *v.* Gardner, L. R. 7 Eq. 317. As to antenuptial provisions of this character, see Schoul. Hus. & Wife, § 365.

[3] *Re* Alexander, 1 Lowell, 470. And see *Re* Jones, 6 Biss. 68.

[4] Levering *v.* Heighe, 2 Md. Ch. 81; Head *v.* Halford, 5 Rich. Eq. 128; Peigne *v.* Snowden, 1 Desaus. 591.

[5] 4 Kent Com. 463.

[6] Sugden Vend. & Purch. 587, 13th ed.; Peachey Mar. Settl. 226; 4 Kent Com. 463.

been made with fraudulent views, and must be set aside in favor of a subsequent purchaser for a valuable consideration, even though he had notice of the prior deed.[1] In other words, while the statute of 13 Eliz. permits a voluntary conveyance to stand as against subsequent creditors, that of 27 Eliz. makes a voluntary conveyance of land void as against a subsequent purchaser for value. The principle on which the English cases rest appears to be that, by selling the property over again for a valuable consideration, the vendor so entirely repudiates the former transaction and shows his intention to sell, that the presumption against the prior gift becomes conclusive.[2] And while the correctness of this principle might well be doubted in its application to subsequent purchasers with notice, yet, as Lord Thurlow said, so many estates stand upon the rule, that it cannot be now shaken.[3] This doctrine applies to postnuptial settlements in England.[4] Fortunately in this country we have been hampered by no such severe construction of this statute. And in a case before the Supreme Court of the United States it was held that the principle of construction which prevailed in England at the commencement of the American Revolution went no further than to hold the subsequent sale to be presumptive, and not conclusive, evidence of a fraudulent intent in making the prior voluntary conveyance; and the court declined to follow the subsequently established construction of Westminster Hall.[5] And the better American doctrine seems to be that voluntary conveyances of land, *bona fide* made, and not originally fraudulent, are valid as against subsequent purchasers having record or other notice.[6]

In some States, the English statute is re-enacted with the

[1] Doe *v.* Manning, 9 East, 59.

[2] Doe *v.* Rusham, 17 Q. B. 724; 16 Jur. 359.

[3] Evelyn *v.* Templar, 2 Bro. C. C. 148; Peachey Mar. Settl. 228, and cases cited.

[4] See Bill *v.* Cureton, 2 Myl. & K. 510; Peachey Mar. Settl. 232, 240. And English conveyancers insert words importing certain valuable considerations in such deeds, in order to deter purchasers.

[5] Cathcart *v.* Robinson, 5 Pet. 280.

[6] 4 Kent. Com. 464, *n.*, and cases cited; Jackson *v.* Town, 4 Cow. 603; Ricker *v.* Ham, 14 Mass. 139; Atkinson *v.* Phillips, 1 Md. Ch. 507; Shepard *v.* Pratt, 32 Iowa, 296; Beal *v.* Warren, 2 Gray, 447. But *contra*, see Clanton *v.* Burges, 2 Dev. Ch. 13.

language essentially changed; as in Connecticut and New York. And it is the settled American doctrine that a *bona fide* purchaser for value is protected, whether he purchases from a fraudulent grantor or a fraudulent grantee; and that there is no difference in this respect between a deed to defraud subsequent creditors, and one to defraud subsequent purchasers; both being voidable only and not absolutely void.[1] As to negotiable instruments not overdue, too, the usual equity rule may apply, which protects in general the rights of a *bona fide* holder for consideration and without notice of adverse claim or fraudulent intent.[2]

[1] 4 Kent Com. 464, and cases cited in notes; Anderson *v.* Roberts, 18 Johns. 515; Bean *v.* Smith, 2 Mason, 252; Eldred *v.* Drake, 43 Iowa, 560; Oriental Bank *v.* Haskins, 3 Met. 332. So the English Stat. 3 & 4 Will. IV. c. 27, § 26, protects *bona fide* purchasers for value.

[2] Farmers' Bank *v.* Brooke, 40 Md. 249.

The following American cases may be cited with reference to the effect of a husband's postnuptial settlement as against his creditors, &c. See *supra*, § 186. In several States it is expressly held that a voluntary transfer or conveyance from husband to wife is valid against all subsequent creditors and purchasers. United States Bank *v* Ennis, Wright, 605; Beach *v.* White, Walk. Ch. 495; Davis *v.* Herrick, 37 Me. 397; Story *v.* Marshall, 24 Tex. 305; Phillips *v.* Meyers, 82 Ill. 67. A postnuptial settlement is not invalid, it is recently declared by the Supreme Court of the United States, if rights of existing creditors be not impaired. Clark *v.* Killian, 103 U. S. Supr. 766; Jones *v.* Clifton, 101 U. S. Supr. 225. In New Jersey, however, the rule, as concisely stated, is that the husband's settlement, if voluntary, is fraudulent as to existing debts by an inference of law; and, as to subsequent debts, fraud in fact must be proved. Annin *v.* Annin, 24 N. J. Eq. 184; Belford *v.* Crane, 1 C. E. Green, 265. This is the doctrine in New York and many other States, and indeed a preferable one, though the tendency is to regard intent. Reade *v.* Livingston, 3 Johns. Ch. 481, *supra*, § 186; Lyman *v.* Cessford, 15 Iowa, 229. And Chancellor Kent has ruled, in the leading American case on this subject, that if a settlement after marriage be set aside by the prior creditors, subsequent creditors are entitled to come in and be paid out of the proceeds of the settled estate. Reade *v.* Livingston, 3 Johns. Ch. 481. That intended fraud, and this alone, should be considered, as to a husband's subsequent creditors, in case of his voluntary settlement for his wife and children, see Mattingly *v.* Nye, 8 Wall. 370; Caswell *v.* Hill, 47 N. H. 407; Phillips *v.* Wooster, 36 N. Y. 412; Place *v.* Rhem, 7 Bush, 585; Niller *v.* Johnson, 27 Md. 6; Teller *v.* Bishop, 8 Minn. 226. The husband's condition as to his creditors is to be regarded with reference to the time he made the settlement upon his wife, not with reference to the condition subsequently of his estate upon his death. Leavitt *v.* Leavitt, 47 N. H. 329. Concerning the unfavorable effect of a secret agreement between husband and wife upon the rights of intervening creditors, ignorant of such agreement, see Hatch *v.* Gray, 21 Iowa, 29; Annin *v.* Annin, 24 N. J. Eq. 184; Phelps *v.* Morrison, *ib.* 195. A husband's voluntary conveyance may, from its very substance,

§ 188. **Same Subject; Settlement upon Valuable Consideration.** — There are instances in which a postnuptial settlement has been sustained against creditors and purchasers on the ground that a valuable consideration is interposed.[1] Very slight or technical considerations are often held sufficient to support a gift to the wife in English chancery.[2] So voluntary settlements may become valid by matter *ex post facto*.[3]

be void as to all creditors, being an artifice to keep his property out of his creditor's hands in case of future insolvency while using it in trade. Case *v.* Phelps, 39 N. Y. 164; *supra*, § 186. Equity will regard, in cases of this sort, the intent, notwithstanding a compliance with certain formalities of transfer on the husband's part. Metropolitan Bank *v.* Durant, 22 N. J. Eq. 35. That as to existing creditors, the husband's intent to defraud should be considered, which intent may be inferred from his insolvency or embarrassment, see the late cases of Redfield *v.* Buck, 35 Conn. 328; Gardner *v.* Baker, 25 Iowa, 343; Woolston's Appeal, 51 Penn. St. 452; Bertrand *v.* Elder, 23 Ark. 494; Lloyd *v.* Fulton, 91 U. S. Supr. 479; Myers *v.* King, 42 Md. 65.

The right of a husband to settle the surplus of property, over and above what he then owes, for the benefit and future comfort of wife and children, is liberally considered in Gridley *v.* Watson, 53 Ill. 186; Vance *v.* Smith, 2 Heisk. 343; Brookbank *v.* Kennard, 41 Ind. 339; White *v.* Bettis, 9 Heisk. 645. But even here it is proper that abundant means for creditors should be reserved, nor should such a settlement be with a view of incurring debts in the future. Allen *v.* Walt, 9 Heisk. 242.

For instances where a husband's voluntary conveyance to his wife has been set aside as in fraud of creditors, see Clarke *v.* McGeihan, 25 N. J. Eq. 423; Watson *v.* Riskamire, 45 Iowa, 231; Annin *v.* Annin, 24 N. J. Eq. 184. See further, Davidson *v.* Lanier, 51 Ala. 318; Bowser *v.* Bowser, 82 Penn. St. 57; Nippes's Appeal, 75 Penn. St. 472.

"Fraud," observes Mr. Justice Swayne in a recent case, "is always a question of fact with reference to the intention of the grantor. Where there is no fraud, there is no infirmity in the deed. Every case depends upon its circumstances and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test." Lloyd *v.* Fulton, 91 U. S. Supr. 479. In this case it was held that the husband's prior indebtedness, apart from insolvency, &c., was only presumptive, and not conclusive, proof of fraud, and that the presumption was open to explanation. And see Patrick *v.* Patrick, 77 Ill. 555; Booker *v.* Worrill, 55 Ga. 332; Kaufman *v.* Whitney, 50 Miss. 103. Yet transfers to the wife of an insolvent debtor, and even purchases by her, are justly regarded with suspicion; and consideration from her separate estate must be established by affirmative proof. Seitz *v.* Mitchell, 94 U. S. Supr. 580; Kehr *v.* Smith, 20 Wall. 31.

As to a settlement in favor of minor children, &c., see Schoul. Hus. & Wife, § 378.

[1] Lord Hardwicke, in Ambl. 121. See further, Macq. Hus. & Wife, 277; 3 Vern. 220; Ward *v.* Shallet, 2 Ves. Sen. 17; Lavender *v.* Blackstone, 2 Lev. 147; Arundell *v.* Phipps, 10 Ves. 140.

[2] Peachey Mar. Settl. 233, 238; Butterfield *v.* Heath, 15 Beav. 414; Bayspoole *v.* Collins, L. R. 6 Ch. 228; *Ex parte* Fox, L. R. 1 Ch. D. 302; Schoul. Hus. & Wife, § 381.

[3] Peachey Mar. Settl. 236; 1 Sid. 133; Brown *v.* Carter, 5 Ves. 877.

In this country, as also in England, a voluntary settlement by a husband upon his wife may become valid by matter subsequently arising.[1] The rule is general that, where any marriage settlement is for a valuable consideration, it cannot be avoided as fraudulent upon the creditors, unless both husband and wife were cognizant of the fraud; her position here being the usual one of *bona fide* purchaser for value.[2] And in numerous instances the equity courts of various States have sustained a postnuptial gift or transaction in the wife's favor and against the husband's creditors, on the ground that a valuable consideration was interposed.[3]

[1] 4 Kent Com. 463; Sterry *v.* Arden, 1 Johns. Ch. 261; Huston *v.* Cantrill, 11 Leigh, 136.

[2] Magniac *v.* Thompson, 7 Pet. 348; 4 Kent Com. 463. The connection between prior and subsequent, so as to sustain the consideration, should be shown. Cheatham *v.* Hess, 2 Tenn. Ch. 763.

[3] As where the husband has transferred property to his wife in consideration of payment from her separate estate. Simmons *v.* McElwain, 26 Barb. 420; Bullard *v.* Briggs, 7 Pick. 533; Ready *v.* Bragg, 1 Head, 511. And see Teller *v.* Bishop, 8 Minn. 226; Butterfield *v.* Stanton, 44 Miss. 15; Randall *v.* Lunt, 51 Me. 246; Reich *v.* Reich, 26 Minn. 97; Mix *v.* Andes Ins. Co., 16 N. Y. Supr. 397. And where he conveys what her equity entitles her to claim. Poindexter *v.* Jeffries, 15 Gratt. 363. And where he has appropriated a like amount of his wife's property without her consent. Wiley *v.* Gray, 36 Miss. 510. So where the wife pays her husband's debts from her separate earnings. Dygert *v.* Remerschneider, 39 Barb. 417. Or releases her dower or homestead. Unger *v.* Price, 9 Md. 552; Randall *v.* Randall, 37 Mich. 563; Randles *v.* Randles, 63 Ind. 93; Nalle *v.* Lively, 15 Fla. 130; Payne *v.* Hutcheson, 32 Gratt. 812; Garlick *v.* Strong, 3 Paige, 440; Hale *v.* Plummer, 6 Ind. 121; Andrews *v.* Andrews, 28 Ala. 432. Or, in general, releases her interest in his property. Davis *v.* Davis, 25 Gratt. 587. Or advances money to the husband to buy land, even though it be conditioned upon paying and securing the money to her children. Goff *v.* Rogers, 71 Ind. 459. Or where the husband is indebted to her for rents collected from her separate real estate. Barker *v.* Morrill, 55 Ga. 332; Kaufman *v.* Whitney, 50 Miss. 103. Or upon any debt due her. French *v.* Motley, 63 Me. 326; Brigham *v.* Fawcett, 42 Mich. 542; Lahr's Appeal, 90 Penn. St. 507. Or a claim, generally, which grows out of the husband's appropriation of his wife's separate estate, if founded on an agreement to refund. Odend'hal *v.* Devlin, 48 Md. 439. See also Johnston *v.* Gill, 27 Gratt. 587; Thompson *v.* Feagin, 60 Ga. 82; Bedell's Appeal, 87 Penn. St. 510. But not a claim for the husband's mere appropriation, without any such agreement to refund. Clark *v.* Rosenkrans, 31 N. J. Eq. 665. See also Rose *v.* Brown, 11 W. Va. 122. And see Schoul. Hus. & Wife, § 380.

But where the consideration advanced by the wife is inadequate, equity will never sustain the settlement further than to secure the repayment thereof, and not always even to this extent; especially if she be privy, with her husband, to a fraud upon others. Herschfeldt *v.* George, 6 Mich. 456; Skillman *v.* Skillman, 2 Beasl. 403; Farmers' Bank *v.* Long, 7 Bush,

§ 189. **Postnuptial Settlements as between the Spouses.** — The effect of a postnuptial settlement, as between the parties themselves, and independently of the rights of creditors and purchasers, claims our further attention for this chapter. Although a direct gift of property by the husband to the wife is void at law, it will be sustained in equity, so far as they are concerned and heirs and personal representatives and assigns. In general, to constitute a voluntary gift between parties, it must be complete, or courts of equity will not enforce it; and not only must the intention to give clearly appear, but that intention must have been executed.[1] But the rule is more favorable as to a *cestui que trust* claiming against his trustee;[2] and it is thus perceived why, on general principles, the intervention of a trustee is preferable to support such a settlement. All voluntary conveyances, though void against creditors and purchasers for value, are good against the grantor and those claiming under him.[3]

A voluntary promise does not constitute a perfect gift. Nor is a voluntary assignment, unaccompanied by other acts, more effectual to confer a title on the donee than a mere agreement, as it has been repeatedly held in equity.[4] But there is some difficulty in reconciling the authorities on this latter subject.[5]

It has been repeatedly held, in chancery courts of the United States, that gifts of personal property or voluntary conveyances of real estate from husband to wife are, as be-

337; Den *v.* York, 13 Ired. 206; Pusey *v.* Harper, 27 Penn. St. 469; 2 Kent Com. 174; William & Mary College *v.* Powell, 12 Gratt. 372; *supra*, c. 12; Coates *v.* Gerlach, 44 Penn. St. 43.

Statutory requirements, such as registry, may affect postnuptial settlements as to creditors. And see other relative points, Schoul. Hus. & Wife, §§ 380, 381.

[1] Cotteen *v.* Missing, 1 Madd. 176; Kekewich *v.* Manning, 1 De G. M. & G. 188.

[2] Ellison *v.* Ellison, 6 Ves. 662; Peachey Mar. Settl. 245, 246; Meek *v.* Kettlewell, 1 Hare, 470; Kekewich *v.* Manning, 1 De G. M. & G. 192; Beech *v.* Keep, 18 Beav. 289.

[3] Bill *v.* Cureton, 2 Myl. & K. 510; Doe *v.* Rusham, 17 Q. B. 724.

[4] Edwards *v.* Jones, 1 M. & Cr. 226; Holloway *v.* Headington, 8 Sim. 324.

[5] See Bridge *v.* Bridge, 16 Beav. 321; McFaddyn *v.* Jenkyns, 1 Hare, 462; Peachey Mar. Settl. 247, 248; Penfold *v.* Mould, L. R. 4 Eq. 562; Schoul. Hus. & Wife, § 384; Fox *v.* Hawks, L. R. 13 Ch. D. 822.

tween themselves, valid, and such is now the rule in most, but not all, of the States; the married women's acts in some jurisdictions creating a legal estate in the wife under such circumstances. The evidence of intention should be clear and distinct in all such cases.[1] There should be a clear irrevocable gift to a trustee for the wife, or some positive act by the husband, by which he divests himself of the property, and engages to hold it for the wife's separate use.[2]

§ 190. **The Same Subject.** — But the circumstances under which the husband's transfer is made are always material. Thus a husband might have placed his earnings or property in his wife's hands for safe-keeping, and not as a gift to her,

[1] Borst *v.* Spelman, 4 Comst. 284; Coates *v.* Gerlach, 44 Penn. St. 43; Jennings *v.* Davis, 31 Conn. 134; George *v.* Spencer, 2 Md. Ch. 353; Reynolds *v.* Lansford, 16 Tex. 286; Hunt *v.* Johnson, 44 N. Y. 27; Sims *v.* Rickets, 35 Ind. 181; Kitchen *v.* Bedford, 13 Wall. 413; Campbell *v.* Galbreath, 12 Bush, 459.

[2] But see Towle *v.* Towle, 114 Mass. 167. As to a gift *causa mortis*, see *post*, cs. 15–17.

It would appear to be the rule of some States, that the gifts of a husband require less proof than the gifts of third persons. Deming *v.* Williams, 26 Conn. 226. In some States, however, the wife is put upon strict proof as to all implied gifts. Gannard *v.* Eslava, 20 Ala. 733; Paschall *v.* Hall, 5 Jones Eq. 108; Hollifield *v.* Wilkinson, 54 Ala. 275. The precise extent to which the rule of a gift without a trustee will be enforced depends greatly upon the liberality of the married women's legislation in any particular State. See Schoul. Hus. & Wife, § 385; Underhill *v.* Morgan, 33 Conn. 105; Brown *v.* Brown, 23 Barb. 565; Jennings *v.* Davis, 31 Conn. 134; Wilder *v.* Aldrich, 2 R. I. 518. But it is said that a man cannot denude himself of his marital rights in property which the law vests in him by simply declaring that it belongs to his wife. Wade *v.* Cantrell, 1 Head, 346. For the principles applicable to such gifts, see 2 Sch. Pers. Prop. Part. V. c. 2. Thus the promissory note of a creditor or other third party may thus be legally transferred by the husband to his wife under some of the married women's acts; and independently of such statutes on equitable grounds. His voluntary settlement of choses or incorporeal personalty upon her is good, *prima facie;* and this may include an assignment of a claim due him. The husband may make a gift to his wife if depositing in some savings bank on his wife's separate account, by his acts binding the bank to account to her. Leasehold property may be assigned to the wife by way of gift. Where the husband gives corporeal property there should be some visible change of possession manifested; and in gifts, as of furniture, of that which remains in the common dwelling-house, there may be difficulty in establishing a transfer. The wife may be the grantor, under due statutory formalities, of real estate from her husband, or of real and personal property combined. Rents and profits may be secured to her exclusive beneficial use. But to prove the executed gift, so as to establish a *bona fide* transfer against the husband's creditors, involves, of course, the greater difficulty. See Schoul. Hus. & Wife, § 386.

in which case title to the fund should be respected accordingly as between them; or it might be regarded, perhaps, as bestowed for their joint benefit or that of the whole family upon due proof. Or the understanding might be that the transaction was to stand upon mutual consideration or by way of security.[1]

While instances of gifts or voluntary conveyances from husband to wife are most commonly considered, gifts from wife to husband are by no means rare. But in the latter instance fraud or undue influence may be reasonably suspected; and transactions of this sort are scrutinized by the courts with great care.[2] Before the wife's separate use was established in chancery, little or no occasion could arise for the wife to bestow her personal property upon her husband, for the law sufficiently bestowed it without her aid.

If husband and wife may transfer property to one another without consideration, still more may they do so where the consideration is valuable. All such provisions, even if made without the intervention of a trustee, though void in law (independently of suitable married women's acts), may be enforced in equity if fairly made between the parties, and with no fraudulent intent upon others concerned;[3] a rule which, with particular force, sustains an indebted husband's provision in his wife's favor, wholly or partially executed.[4]

[1] Marshall *v.* Crutwell, L. R. 20 Eq. 328; Adlard *v.* Adlard, 65 Ill. 212; Edgerly *v.* Edgerly, 112 Mass. 175; Grain *v.* Shipman, 45 Conn. 572; Linker *v.* Linker, 32 N. J. Eq. 174. See further, Schoul. Hus. & Wife, § 388. The husband's gift may be qualified instead of absolute, as in other instances of gift. Jones *v.* Clifton, 101 U. S. Supr. 225.

[2] Cruger *v.* Douglas, 4 Edw. Ch. 433; Nedby *v.* Nedby, 11 E. L. & Eq. 106; *Re* Jones, 6 Biss. 68; Converse *v.* Converse, 9 Rich. Eq. 535; Stiles *v.* Stiles, 14 Mich. 72; Hollis *v.* Francois, 5 Tex. 195; Wales *v.* Newbould, 9 Mich. 45. As to gifts and loans of the wife's separate property to her husband, including mortgages, see also *supra*, § 155.

[3] See *supra*, § 188. And see Crouse *v.* Morse, 49 Iowa, 382.

[4] The husband's note or bond to pay money in consideration that his wife would live with him is not a good consideration. Roberts *v.* Frisby, 38 Tex. 219; Ximines *v.* Smith, 39 Tex. 49. Nor prior advances to the wife disconnected with the settlement, and made without expectation of repayment. Perkins *v.* Perkins, 1 Tenn. Ch. 537. But where the wife advances money to her husband as his creditor, or the latter is indebted to her upon any valid consideration, a fair conveyance or transfer may be made to adjust or secure such liability. Kesner *v.* Trigg, 98 U. S. Supr. 50; Clough *v.* Russell, 55 N. H. 279; Sims *v.* Rickets,

The common-law requirement that trustees shall intervene in conveyances or transfers between husband and wife no longer prevails to any great extent, in England or the United States, as a doctrine of equity.[1] But trustees are always desirable; and in some States it is a rule that the husband and wife can only contract with one another through the intervention of third persons.[2]

§ 191. **General Transactions between Husband and Wife.** — In general, wherever a contract is just and reasonable of itself, and would be good at law when made with trustees for the wife, that contract will be sustained in equity, when made between husband and wife without the intervention of trustees,[3] notwithstanding that at common law spouses could not make mutual contracts.[4] But as to a wife, her contract prejudicial to her interests is still so unfavorably regarded, that a statute must be explicit in order to bind her as to her executory contracts or general engagements with her husband. The married women's acts, as yet, seldom permit of a wife's executory contracts with any one outside her separate estate or separate trade.[5] But whatever the law will compel parties

35 Ind. 181; Schoul. Hus. & Wife, § 391, and cases cited. Releases of dower in husband's lands may furnish consideration. Sykes *v.* Chadwick, 18 Wall. 141 (a statute case).

As to transfers out of all proportion to the consideration, and apparently fraudulent, see Kelley *v.* Case, 18 Hun. 472; Warren *v.* Ranney, 50 Vt. 653. And for contracts of this kind, specifically enforced, see Livingston *v.* Livingston, 2 Johns. Ch. 537.

[1] Jones *v.* Clifton, 101 U. S. Supr. 225; Baddeley *v.* Baddeley, 26 W. R. 850; Thomas *v.* Harkness, 13 Bush, 23.

[2] McMullen *v.* McMullen, 10 Iowa, 412; Johnston *v.* Johnston, 1 Grant, 468; Pike *v.* Baker, 53 Ill. 163; Rowland *v.* Plummer, 50 Ala. 182. See further, Schoul. Hus. & Wife, § 392, 393, as to the rectification and construction of such settlements.

[3] Wallingsford *v.* Allen, 10 Pet. 583; 2 Story Eq. Juris. § 1204; Slanning *v.* Style, 3 P. Wms. 334; Barron *v.* Barron, 24 Vt. 375; Resor *v.* Resor, 9 Ind. 347; Coates *v.* Gerlach, 44 Penn. St. 43; Wright *v.* Wright, 16 Iowa, 496; Williams *v.* Maull, 20 Ala. 721; Schaffer *v.* Reuter, 37 Barb. 44; Hutton *v.* Duey, 3 Barr, 100; Sims *v.* Rickets, 35 Ind. 181; McCampbell *v.* McCampbell, 2 Lea, 661; Myers *v.* King, 42 Md. 65.

[4] A mutual agreement, by which the wife renounces all further claim upon the husband for his services, or necessary support for herself, and stipulates that she will contract no debts on his account, while the husband renounces all claim for her services or support, affords a strong illustration. This might not avail against creditors, but so far as the husband and his heirs, and in fact all who claim under him, are concerned, it will be enforced. Barron *v.* Barron, 24 Vt. 375.

[5] Bassett *v.* Bassett, 112 Mass. 99;

to do, they may do voluntarily; and this is a principle applicable to transactions as between husband and wife, so far as equity may exercise jurisdiction in the case.[1]

§ 192. **Transfer of Note from one Spouse to the Other; Conveyance.** — A wife is not legally liable, in the absence of an enabling statute, upon a promissory note made by her, payable to her husband's own order, and by him indorsed over.[2] And the husband's note, given to his wife and transferred by her, is equally void.[3]

A conveyance, by husband and wife, of land belonging to the wife, to a third person, and a conveyance of the same land by such third person to the husband, vests the entire title in the husband.[4] But a conveyance of lands by the wife directly to her husband, especially if it be voluntary, has been considered ineffectual and void. So it is the older rule that the husband cannot convey real estate to his wife directly, and without the intervention of a trustee.[5] But the husband may make a valid conveyance to his wife through the medium of a third person.[6]

The reason of this rule was the legal unity of husband and wife at the common law; while the statutes of uses furnished a mode of conveyance through trustees.[7]

§ 193. **Conveyances or Transfers to Husband and Wife; Effect.** — It may here be added that, at the common law, a conveyance of land to husband and wife and their heirs vests the entirety in each of them; and upon the death of one the survivor takes the whole estate, discharged of the other's debts.[8]

Hogan *v.* Hogan, 89 Ill. 427; Jenne *v.* Marble, 37 Mich 319. Some statutes are explicit enough for such purposes. Hamilton *v.* Hamilton, 89 Ill 349. And see Schoul. Hus. & Wife, § 394 and appendix.

[1] SeeCampbell *v.* Galbreath, 12 Bush, 459; Randall *v.* Randall, 37 Mich. 563.

[2] Roby *v.* Phelon, 118 Mass. 541

[3] Hoker *v.* Boggs, 63 Ill. 161; Morrison *v.* Thistle, 67 Mo. 596; Greer *v.* Greer. 24 Kan. 101; McCampbell *v.* McCampbell, 2 Lea, 661. This rule is now changed in many States. See Schoul. Hus. & Wife, § 396.

[4] Merriam *v.* Harsen, 4 Edw. Ch. 70; Durant *v.* Ritchie, 4 Mason, 45; Garvin *v.* Ingram, 10 Rich. Eq. 130; Bowen *v.* Sebree, 2 Bush, 112.

[5] Voorhees *v.* Presbyterian Church, 17 Barb. 103; Ransom *v.* Ransom, 30 Mich. 328.

[6] Schoul. Hus. & Wife, § 397. Under some late local acts a wife may convey directly to her husband, or the husband to the wife. *Ib.*

[7] 1 Washb. Real Prop. 279.

[8] Wright *v.* Sadler, 20 N. Y. 320; Banton *v.* Campbell, 9 B. Monr. 587; Gilson *v.* Zimmerman, 12 Mo. 385;

The estate of entirety may be conveyed in fee or encumbered by the joint deed of husband and wife.[1] And in some States legislation has abrogated this common-law doctrine of entirety altogether.[2]

Where a promissory note, too, or other evidence of a debt, or personal security, is made payable to a husband and wife jointly, it belongs to the survivor, and may be sued upon accordingly; but not if the facts are inconsistent with that presumption of joint-ownership which a technical expression of this sort would afford; and the drift of modern policy, we may add, is unfavorable to extending to personalty this rule of survivorship, applicable originally to real estate.[3]

§ 194. **Questions of Resulting Trust between Husband and Wife.** — The question whether a resulting trust is established in certain property of husband or wife comes up constantly in the latest American cases, with the extension of equity jurisdiction in the States and the new married women's legislation. Issues of this sort are made up not only where the claim is that of a wife against her husband, or of a husband against his wife, but in controversies between either one and the creditors of the other. The decision must be according to the evidence adduced, which is usually oral, deference being paid to the usual presumptions as between husband and wife; but the ostensible title afforded by instruments of title or security standing in the name of the one is thus overthrown by proof that the property actually belonged by right to the other.[4]

Equity, in recognizing husband and wife as distinct persons capable of contracting with one another and holding

Schoul. Hus. & Wife, § 398, where this subject is considered at length.

[1] McDuff *v.* Beauchamp, 50 Miss. 531. See Insurance Co. *v.* Nelson, 103 U. S. Supr. 514.

[2] And thus may the spouses be regarded as joint tenants or rather tenants in common. Cooper *v.* Cooper, 76 Ill. 57; Whittlesey *v.* Fuller, 11 Conn. 337; Clark *v.* Clark, 56 N. H. 105; Meeker *v.* Wright, 76 N. Y. 262; Abshire *v.* State, 53 Ind. 64; Sanford *v.* Sanford, 45 N. Y. 723; Johnson *v.* Lusk, 6 Cold. 113.

[3] Wait *v.* Bovee, 35 Mich. 425. As to joint investments by husband and wife, and their joint liabilities, see Schoul. Hus. & Wife, § 400.

[4] See Schoul. Hus. & Wife, § 400, and cases, where this subject is further discussed. And see *ib.* § 401, as to purchases of one another's property.

property adverse to one another's claims, affords the relief appropriate to such a situation. Where either one is false to the other, and fraudulently or through coercion procures an unjust advantage, chancery will relieve against the transaction.[1]

§ 195. **Insurance upon Husband's Life.** — Insurance is frequently effected by a husband on his own life for the separate benefit of his wife; a provision most just and honorable, if not so unreasonable in amount, with its incidental payment of premiums, as to defraud one's antecedent creditors.[2]

CHAPTER XV.

DEATH OF THE WIFE; RIGHTS AND LIABILITIES OF THE SURVIVING HUSBAND.

§ 196. **Husband's Right to Administer.** — On the death of the wife, the husband becomes entitled to administer on her estate. The court having jurisdiction in such matters must issue letters to him, and to him alone, unless he renounce or decline. The foundation of this claim has been variously stated; by some it is said to be derived from the statute 31 Edw. III., on the ground of the husband's being "the next and most lawful friend" of his wife; while there are other authorities which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes. But this right, however founded, is now regarded in England as unquestionable, and is expressly confirmed by the statute 29 Car. II. c. 3 (amendatory of statute 22 & 23 Car. II. c. 10), which enacts that the statute of distributions "shall not extend to the estates of *femes covert* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal

[1] Case *v.* Colter, 66 Ind. 336; Stone *v.* Wood, 85 Ill. 603; Tucker's Appeal, 75 Penn. St. 354; Schoul. Hus. & Wife, §§ 389, 403.

[2] Schoul. Hus. & Wife, § 404. Statutes affect this right in nearly all of the States. *Ib.* appendix.

estates, and recover and enjoy the same as they might have done before the making of the said act." [1] This same right of the husband is generally, though not universally, recognized in this country, and in the different States there are statutes which regulate the subject of administration; and these statutes are usually found to recognize and confirm the husband's preferred right to administer upon his wife's estate.[2]

To this rule some exceptions have been introduced, however, in later years, both in England and the United States, owing chiefly to the modern facilities for separation and divorce, and the enlarged capacity given to the wife to act as a *feme sole*, and to dispose of her own property.[3]

Since, as we have already seen, the husband takes absolutely his wife's personal *choses in possession* at the common law by virtue of the marriage, and, if he be the survivor, her chattels real likewise, there would generally appear to be no object gained in seeking letters of administration on her estate, under the coverture doctrine, unless she had *choses in action* unrecovered at the time of her death. But a case might arise, besides, where he had a just claim against her estate, and wished to enforce it by a sale of her real estate as administrator. Or he might intend to prosecute a suit. Or letters of administration might be desirable for the purposes of creditors. And peculiar considerations apply sometimes, as we shall presently see, to what we term the wife's separate property, even after her death. Cases, moreover, in these days are found, where a husband is made the executor under his wife's will.[4]

§ 197. **The Same Subject; Assets for Wife's Debts.** — There is a common-law distinction between property acquired by

[1] Wms. Ex'rs, 4th Am. ed. 336 *et seq.*

[2] 2 Kent Com. 135; *ib.* 410.

[3] Thus, in a late English case, where a married woman lived separate from her husband, after having obtained an order of protection, and then died, leaving him and a minor son, administration was granted to a guardian elected by the son, upon proper security, without citing the father. Goods of Stephenson, L. R. 1 P. & D. 285. And in this country the marital rights of the husband over the wife's unadministered property, when her death occurred during a state of separation for his misconduct, have been sometimes denied. Cooper *v.* Maddox, 2 Sneed, 135.

[4] Martin *v.* Foster, 38 Ala. 688. See Schoul. Hus. & Wife, Part VIII. c. 5.

the husband absolutely by virtue of marriage, and property acquired in his representative capacity as her administrator or executor. The former is his own, free from all demands of his wife's creditors. But the latter comes to him only by way of distribution, after payment of all just debts against his wife's estate.[1] In the case of an antenuptial debt, he who married the woman indebted became responsible under qualifications, ceasing to be responsible, however, upon his wife's decease.[2] Debts contracted by the wife during marriage follow a somewhat different rule at the common law; for either they are the debts of the husband or no legal debts at all;[3] and if his debts, he must be held responsible in his personal, and not a fiduciary capacity.

The modern change of policy with regard to a wife's debts, whereby the wife may hold separate property upon which her separate liabilities should be fastened, occasions an obvious departure in the latest decisions and statutes. Hence the statute rule now introduced into many States, that the husband shall be held liable as administrator on the estate of his wife for her debts, only to the extent of the assets received by him.[4]

§ 198. **Surviving Husband's Rights in Wife's Personal Property.** —We have seen that at the common law, and conformably to the doctrine of coverture, marriage operates as a gift to the husband of the wife's personal property, both principal and income, whether acquired by her before or during the marriage state; but with this qualification, that, so far as

[1] A notable case in point is that of Heard *v.* Stamford, where a single woman contracted a debt for which she gave her promissory note of £50. She afterwards married, and brought to her husband a fortune of £700. On her death it appeared that the husband had acquired a portion of this fortune during coverture; the other portion was still outstanding at her death as a *chose in action*, and could only be recovered by the late husband as her administrator. Lord Chancellor Talbot decided that from the latter portion, after it had been recovered, the creditor should be satisfied; but that no claim could be enforced against the former portion. Heard *v.* Stamford, Cas. temp. Talb. 173; 3 P. Wms. 409; Macq. Hus. & Wife, 188. And see Hetrick *v.* Hetrick, 13 Ind. 44; Donnington *v.* Mitchell, 1 Green Ch. 243.

[2] *Supra*, §§ 56, 57.

[3] See Hill *v.* Goodrich, 46 N. H. 41; Bain *v.* Doran, 54 Penn. St. 124; *supra*, § 59.

[4] See N. Y. Rev. Stat. Vol. II. p. 75; Schoul. Hus. & Wife, appendix.

choses in action are concerned, or incorporeal personalty, he must reduce to possession while marriage lasts, in order to make the property absolutely his own.[1] Hence *choses in action* unrecovered at her death belong, technically speaking, to her estate. The wife's earnings were the husband's;[2] and as to her chattels real, if he survived her, they became his absolutely.[3]

In these days, it becomes important to understand how far the modern creation of a separate estate in the wife's favor may have modified this doctrine to the husband's detriment. The equitable rule, so familiar to England, has been that the separate use ceases with the marriage state; so that, subject to the restrictions of a trust under which the wife might have acquired any specific separate property, or her possible disposition of separate property during her lifetime (no clause of restraint impeding her), the surviving husband became entitled to whatever was left, under the rules and subject to the limitations of the common law. That is to say, as to personal property, her *choses in possession* vested in him absolutely, and also her chattels real, while *choses in action* might be recovered for his benefit in due course of administration.[4] The United States rule of equity appears to have treated the separate estate as ceasing upon the wife's death with similar consequences.[5] Generally speaking, both in England and this country, the fact that a husband allows his wife to treat and deal with, as her own, property acquired by her independently of the married women's acts, is not inconsistent with his intention to assert his marital rights to it if he survive; neither, if he allows her to dispose of the income and loan it on promissory notes running in her own name, would such income become thereby converted into her separate estate.[6] Moreover, the married women's acts themselves, in the absence of unequivocal language, do not change the common-law rule with reference to separate personal property of a married woman, not disposed of in her life nor by will; but

[1] Schoul. Hus. & Wife, § 148.
[2] *Ib.*
[3] *Ib.* § 164.
[4] *Ib.* § 196. And as to real estate, see *ib.* § 196, and *post*, § 201.
[5] *Supra*, § 233.
[6] Ryder *v.* Hulse, 24 N. Y.

it goes to her surviving husband by virtue of his marital rights in the same manner as under the old law.[1]

By the English statutes of distribution, therefore (and perhaps by the common law), not only is the husband entitled to administer upon his wife's estate in preference to all others, but, subject to the payment of such debts as bind him upon surviving her, he recovers her outstanding personal property to his own use and enjoyment, including rights vested and contingent, and funds at her disposal during her lifetime or held in trust for her, save so far as he may be excluded by the terms of the trust. Even if he does not take out letters of administration, he is equally entitled to the property.[2] He is therefore said, when he administers, to administer for his own benefit, being the party in interest preferred to all others, so far as personal estate is concerned. And since husband and wife are not, properly speaking, next of kin to one another, the title the husband thus acquires may be designated as a title *jure mariti* under the statutes of distribution.[3] But with the modern recognition of separate use, an exercise of the wife's testamentary appointment or will may be found to interfere with the husband's rights both as surviving administrator and distributee.

Furthermore, the principle that the husband administers exclusively for his own benefit on his wife's estate is incompatible with the legislation of some States. For in this country the modern tendency is not only to enlarge the wife's power of testamentary disposition, but to require administration to be taken out in all cases where a married woman with a separate estate dies intestate ; nor is the surviving husband in all the States absolutely preferred to kindred either as administrator or distributee.[4]

[1] Ransom *v.* Nichols, 22 N. Y. 110; Wilkinson *v.* Wright, 6 B. Monr. 576; Brown *v.* Brown, 6 Humph. 127.

[2] Clough *v.* Bond, 6 Jur. 50.

[3] 2 Bl. Com. 515; Watt *v.* Watt, 3 Ves. 246, 247; 2 Kent Com. 136; Schoul. Hus. & Wife, §§ 409, 414, and authorities cited.

[4] Holmes *v.* Holmes, 28 Vt. 765; Schoul. Hus. & Wife, § 409; Cox *v.* Morrow, 14 Ark. 603; Nelson *v.* Goree, 34 Ala. 565; Baldwin *v.* Carter, 17 Conn. 201; Curry *v.* Fulkinson, 14 Ohio, 100; Gill *v.* Woods, 81 Ill. 64; Wilson *v.* Breeding, 50 Iowa, 629; Woodman *v.* Woodman, 54 N. H. 226.

Postnuptial transactions between husband and wife give rise to delicate

§ 199. **Husband's Obligation to bury Wife: Rights corresponding.** — Every husband is bound, at the common law, to bury his deceased wife in a suitable manner; that is to say, he is bound to defray all necessary funeral expenses. Even when a wife dies who had been living separate from her husband, it is held that her surviving husband must provide her with a funeral at a reasonable expense; and, if he neglects to do so, any person who voluntarily employs an undertaker for that purpose, and pays him for his services, is entitled to recover the sum thus expended from the husband in an action at law.[1] So, too, where the wife died during the absence of her husband abroad, so that it was necessary for another to superintend the funeral.[2] And it is held that even an infant husband may contract for the interment of his deceased wife, or lawful children, so as to be bound by his contract. The contract will have validity, because it is a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage, and as such it is to be regarded as a contract for his own personal benefit.[3]

These points were decided in England, and it is believed that a similar rule prevails in most, if not all of the States; several recent decisions in point confirming this opinion.[4] As to the further question, whether under the late married women's acts, and our modern policy of conferring upon the wife a separate estate, the husband's obligation binds him to such an expenditure absolutely, so that he can neither make a claim on her separate estate for reimbursement, nor take that separate estate, discharged of all marital trusts, as his own, subject to the settlement of just debts and charges, the burial expenses included, we cannot lay down with confidence at this stage.[5]

questions in the courts after the wife's death, where modern practice permits of an administration in conflict with the surviving husband's interests. See Schoul. Hus. & Wife, § 411, and cases cited; Gill *v.* Woods, 81 Ill. 64; Huston *v.* Cone, 24 Ohio St. 11; Barrack *v.* M'Culloch, 3 Kay & J. 110; Herrington *v.* Robertson, 71 N. Y. 280.

[1] Ambrose *v.* Kenison, 4 E. L. & Eq 361; Bradshaw *v.* Beard, 12 C. B. N. S. 344.

[2] Jenkins *v.* Tucker, 1 H. Bl. 90.

[3] Chapple *v.* Cooper, 13 M. & W. 252.

[4] Smyley *v.* Reese, 53 Ala. 89; Sears *v.* Giddey, 41 Mich. 590; McCue *v.* Garvey, 21 N. Y. Supr. 562; Cunningham *v.* Reardon, 98 Mass. 538.

[5] That a husband is proximately

§ 200. **Death of Husband Pending Settlement of Wife's Estate.** — Where the husband himself dies before the wife's outstanding personal chattels are recovered, his next of kin will be entitled to them in equity. This is the rule in England; also in America, wherever, at all events, the husband's right to administer for his own benefit is recognized; for it is the necessary consequence of that doctrine. In England a somewhat circuitous course was formerly taken in such cases; but this is done no longer. If the husband dies, leaving assets of his wife unadministered, the more rational rule has been that right of administration follows the right of estate, and devolves upon the husband's next of kin.[1]

liable for his wife's funeral expenses, and is bound to bury his wife, admits now of no question. Even if an adult son assisted in giving orders to the undertaker, this does not relieve the husband. Sears *v.* Giddey, 41 Mich. 590. Smyley *v.* Reese, 53 Ala. 89, inclines to treat this obligation as one somewhat like that of supplying necessaries, so as to deny to the husband any credit for such expenditure in the settlement of his wife's estate. But see comments in Schoul. Hus. & Wife, § 412; also McCue *v.* Garvey, 21 N. Y. Supr. 562.

In further recognition of the husband's paramount right in matters relative to his wife's burial, it is held in Massachusetts that a husband who has interred his wife in a public burial-ground is not liable as a trespasser for removing a gravestone, since placed at her grave by her mother, without injuring the stone, and for the purpose of substituting another. Durell *v.* Hayward, 9 Gray, 248; and that the right of removing the remains is his. See bill in equity in Weld *v.* Walker, 130 Mass. 423.

Certainly where separation took place under circumstances which should render the husband liable for his wife's subsequent support, he is liable for her necessary funeral and burial expenses also. Cunningham *v.* Reardon, 98 Mass. 538. And see Sears *v.* Giddey, 41 Mich. 590; Hodgson *v.* Williamson, 42 L. T. 676. But how far the divorce laws may affect the husband's obligation and right of burial is not yet clearly determined. See further, Schoul. Hus. & Wife, §§ 413, 414.

[1] Roosevelt *v* Ellithorp, 10 Paige, 415; Bryan *v.* Rooks, 25 Ga. 622; Ward *v.* Thompson, 6 Gill & J. 349; Patterson *v.* High, 8 Ired. Eq. 52; Schoul. Hus. & Wife, § 415; Fielder *v.* Hanyer, 3 Hag. Ecc. 770. But cf. Bell Hus. & Wife, 52.

In a late English case the defendant received money for a married woman, and wrote to her that he held it at her disposal. The wife died, and then the husband, who had not interfered in the matter; and the wife's administratrix sued the defendant for money had and received to the use of the wife. It was held that the wife's administratrix, rather than the husband's representative, could maintain the action. Fleet *v.* Perrins, L. R. 4 Q. B. 500; s. c. L. R. 3 Q. B 536. But cf. Coleman *v.* Hallowell, 1 Jones Eq. 204. In another English case a female took administration of the estate of a deceased person as creditor, got in a large part of the estate, and paid some of the debts; she afterwards married and died. The husband had taken possession of leaseholds, part of the estate, but no fund had been set apart for the payment of the wife's debt. It was held that ad-

§ 201. **Rights in Wife's Real Estate; Tenancy by the Curtesy.** — The surviving husband's rights in the real estate of his deceased wife remain to be noticed. The immediate effect of coverture, as we have seen, is to invest the husband with the usufruct of all real estate owned by the wife at the time of her marriage, and of all such as may come to her during coverture; this usufruct being in the nature of a freehold, with beneficial enjoyment of rents and profits, and lasting, at all events, during their joint lives.[1]

But the husband at the common law may acquire, upon a certain condition, an enlarged life interest in his wife's lands, and in estates of inheritance of which she was seised in possession during coverture, so as to extend beyond her life if he survives her; in other words, he may be a tenant by the curtesy. Tenancy by the courtesy, or tenancy by curtesy, is a freehold estate in the husband for the term of his natural life. He acquires it by the fact that a child capable of inheritance is born of the marriage. The meaning of the term is somewhat obscure. Some have thought the word "curtesy" signifies the favor or courtesy with which the law regards the husband. Others that it comes from the Latin word *curtis*, and has reference to the feudal custom which permitted the husband, as soon as a son was born, to attend court as one of the *pares curiæ*, and do homage without his wife. But there is reason to believe that tenancy by the curtesy existed in the civil law during the reign of Constantine.[2] This privilege of the husband extends to all lands and tenements of which the wife was seised at any time during coverture, whether legal or trust estate, whether in fee-simple or by way of remainder or reversion.[3] The common law affords herein a rare but positive instance of public policy discriminating in favor of marriage, accompanied by the propagation of children.

ministration of the unadministered effects of the deceased could not be taken by the husband in his own right as a creditor, but only as a representative of his wife. Goods of Risdon, L. R. 1 P. & D. 637.

[1] Schoul. Hus. & Wife, §§ 167, 181; *supra*, § 89.

[2] Washb. Real. Prop. 128, and authorities cited; 2 Bl. Com. 126, and notes by Chitty and others; 2 Bright Hus. & Wife, 116.

[3] *Ib.*; Co. Litt. 30 *a*; *ib.* 29 *a*, *n.* 165; Watts *v.* Ball, 1 P. Wms. 109.

§ 202. **Tenancy by the Curtesy; Subject continued.** — Four things are essential, at common law, to entitle a husband to curtesy. *First.* A lawful marriage. *Second.* Seisin of the wife at some time during coverture. *Third.* Birth alive of issue capable of inheritance. *Fourth.* Death of the wife. After the birth of the child the husband's title to curtesy becomes possible; and the curtesy is then initiate. After the death of the wife the title to curtesy becomes complete; and the curtesy is then consummate.[1] For a full description of curtesy, with its incidents, the reader is referred to elementary works on the law of Real Estate.[2]

Questions concerning this estate are most commonly raised, however, with reference to the second essential above stated.

Of late years tenancy by the curtesy has become practically infrequent in England by reason of the prevalence of marriage settlements excluding such right.[3] In this country it has existed in all of the older States, but is modified in some of them, expressly or by implication, by late statutes. In Iowa and Indiana, curtesy is expressly abolished, and a certain defined interest in the wife's real estate, of the dower sort, goes to her husband instead by way of inheritance. In Texas, California, Louisiana, and other States where the tenure of real estate comes from the community or civil law, rather than the common law, curtesy is not recognized. In some of the States the right of curtesy appears to be denied to husbands who wilfully neglect and desert their wives. In most New England States, and in various other parts of the country, tenancy by the curtesy is expressly reserved by statute.[4] It is decided that curtesy still exists in New York, though doubts were at one time entertained; and under statute qualifications, or independently of them, curtesy ob-

[1] 1 Washb. Real Prop. 130.

[2] 1 Washb. Real Prop. 127 *et seq.*; Williams Real Prop. 8th ed. 218; 4 Kent Com. 27–35. And see Schoul. Hus. & Wife, §§ 420–423.

[3] Wms. Real Prop. 187; 1 Washb. Real Prop. 129.

[4] See statutes of different States cited in 1 Washb. Real Prop. 258, and note; and notes to 4 Kent Com. 34. Statute provisions as to curtesy and dower are frequently alike. And see Schoul. Hus. and Wife, § 424, and Appendix for changes, some of which (as in Massachusetts for instance) are very recent.

tains in perhaps the majority of States. Indeed, curtesy consummate, under the married women's acts, is found protected, notwithstanding the husband's usufruct during his wife's life is taken away or modified.[1] In some States the interest of the husband in his deceased wife's real estate is an absolute one in fee; [2] or curtesy is conferred regardless of the birth of a child.[3]

§ 203. **Husband's Claims against Wife's Real Estate; Improvements, &c.** — Inasmuch as the husband's interest in his wife's lands is limited to the usufruct as a life-tenant, and Anglo-Saxon policy has been that landed property should descend to one's blood relations, it follows that all claims presented by him against her real estate, after her death, in relation to such property, will be closely scrutinized. Thus it has been held that he cannot claim reimbursement for moneys paid in settling controversies in regard to the title of his wife's real estate.[4] So the general rule is strict as regards improvements made by the husband upon his wife's real estate.[5]

[1] Porch *v.* Fries, 3 C. E. Green, 204; Lynde *v.* McGregor, 13 Allen, 182.

[2] Hooper *v.* Howell, 52 Ga. 315; 1 Washb. 129.

[3] 1 Washb. 129; Elliott *v.* Teal, 5 Sawyer, 249.

[4] Campbell *v.* Wallace, 12 N. H. 362; Burleigh *v.* Coffin, 2 Fost. 118. And see Warren *v.* Jennison, 6 Gray, 559. But see 2 Story Eq. Jur. § 1023; Pitt *v.* Pitt, 1 Turn. & Russ. 180; Shrewsbury *v.* Shrewsbury, 1 Ves. Jr. 233; Jenness *v.* Robinson, 10 N. H. 218.

[5] The English doctrine is, that if the husband erects buildings upon his wife's lands, or otherwise makes permanent improvements thereon, expending his own money for such purpose, the presumption is that he intended the expense for his wife's benefit, and he cannot recover for it. 1 Roper Hus. & Wife, 54; Campion *v.* Cotton, 17 Ves. 264; 1 Washb. Real Prop. 281. Several cases of this sort have come before our own courts quite recently, the claims being usually presented after the wife's death; and this principle has been rigidly applied, though doubtless occasioning in some instances positive hardship and wrong. Burleigh *v.* Coffin, 2 Fost. 118, White *v.* Hildreth 32 Vt. 265. Brevard *v.* Jones, 50 Ala 221; Washburn *v.* Sproat, 16 Mass 449. See also, Schoul. Hus. & Wife, § 425.

Concerning the wills of married women, the law of which is greatly affected by recent statutes which tend to place husband and wife on a mutual footing, and enlarge the wife's capacity in equity to make testamentary disposition of her separate estate, see, at length, Schoul. Hus. & Wife, §§ 457–470, and appendix. So, too, as to a wife's testamentary appointment in execution of a power. *Ib.* § 470. The husband's assent has been an important element in such cases until quite recently. *Ib.* § 458.

The marriage of a woman was formerly deemed a revocation of her will executed while single, while marriage and the birth of a child was the rule

CHAPTER XVI.

DEATH OF THE HUSBAND; RIGHTS AND LIABILITIES OF THE SURVIVING WIFE.

§ 204. **Widow's Right to Administer.** — On the dissolution of a marriage by the death of the husband, the widow is usually selected to administer upon his estate, provided she be willing and competent to take the trust. But her right of administration on her husband's estate is not coextensive with that of the husband on her estate. For in the one instance the husband is to be preferred to all others; whereas, in the other, administration may be granted by the court, at discretion, either to the widow alone, or to the next of kin, or to both together.[1] This is the law in England, and the same prevails generally in this country, under the statutes of the different States.[2]

§ 205. **Widow's Distributive Share in Personalty.** — Under the English statute of distributions, 22 & 23 Car. II. c. 10, the widow surviving her husband, who deceased intestate, is entitled to one third of the personal property which remains after payment of the husband's debts, while the remaining

applied to a man. Recent statutes tend to place the spouses on an equal footing in this respect. Schoul. Hus. & Wife, §§ 442, 457. And see 1 Redf. Wills, 24, 297; 3 Jarm. Wills, 5th Am. ed. 783.

[1] 1 Salk. 36; 11 Vin. Abr. 92 Anon. Stra. 552; Macq. Hus. & Wife, 145; Case of Williams, 3 Hag. Ecc. 217. See Goods of Ihler, L. R. 3 P. & D. 50, as to right of a widow, having lived separate from her husband, to administer.

[2] 2 Kent Com. 410, 411, and notes. But by the New York statutes (vol. 2, p. 74, Rev. Stats.), the widow and next of kin are designated. Grant of administration revoked, where it appeared that the marriage under which E. claimed to be widow was void. O'Gara *v.* Eisenlohr, 38 N. Y. 296. And see Mack *v.* State, 63 Ala. 138.

As to administration *de bonis non*, of the husband's estate, where the widow took out administration, carried on her late husband's business, and then died intestate and insolvent, see Fairland *v.* Percy, 3 P. & D. 217. And see, generally, Widgery *v.* Tepper, 5 Ch. D. 516.

two thirds go to the children or their representatives.[1] The widow's share is not unfrequently termed her "thirds," or incorrectly her "thirds of personal estate at common law."[2] The statute further provides that when the husband dies intestate, leaving a widow only and no lineal descendant, the widow is entitled to a moiety, or half of his personal estate, and the other half goes to the husband's next of kin. When there are no next of kin, the widow is not entitled to the whole of her husband's personal estate; but one half belongs to her, and the other half goes to the crown.[3] Here, too, the wife's right is not coequal with that of her husband; for he surviving her takes the whole of her personal estate; while she surviving him cannot in any event be entitled to more than one half of his personal estate, even though the estate consisted wholly of property which belonged to her before marriage. It is held that the widow of a deceased child cannot take as a representative of such child under the statutes of distribution.[4] The husband and wife, by a marriage settlement, may exclude one another from all benefits by way of distribution in their respective estates, other provisions having been substituted by way of recompense.[5] In this country the statute of Charles II. is at the basis of our legislation regarding the estates of intestates, though modifications are frequently to be met with.[6]

It is held that a bequest to the wife by the husband, in full of her legal claims, is no bar to her right to a distributive share in a lapsed bequest.[7] So acts of the husband during his lifetime, committed for the purpose of defrauding the wife of her distributive share in his personal estate after his decease, have been set aside in equity.[8]

[1] 2 Bl. Com. 515, 516.

[2] See Lord Cottenham, in Gurley *v.* Gurley, 6 Cl. & Fin. 741; Macq. Hus. & Wife, 146.

[3] 2 Bl. Com. 515, 516; 2 Kent Com. 427; Cave *v.* Roberts, 8 Sim. 214. In certain localities of England a different rule prevails; the local customs continuing in force. 2 Bl. Com. 518.

[4] Price *v.* Strange, 6 Madd. 161.

[5] Earl of Buckinghamshire *v.* Drury, 2 Eden, 60.

[6] See 2 Kent Com. 11th ed. 427, 428, and notes; Schoul. Hus. & Wife, § 427, and appendix, as to these changes in different States.

[7] Garthshore *v.* Chalie, 10 Ves. Jr. 1. But see Wright *v.* Fearis, 3 Swanst. 181.

[8] Hays *v.* Henry, 1 Md. Ch. 337. Cf.

§ 206. **Widow's Waiver of Provision of Will.** — The wife's privilege is carried even farther in Massachusetts and various other States, by a statute which permits the widow to waive a provision made for her by her husband's will, and thereupon to take such portion as the law would have given her had he died intestate.[1] But this privilege is accorded with some restrictions as to the full amount to be allowed her.[2] The right on her part becomes complete upon her formal renunciation of the provisions under the will, without any surrender of property under the will.[3] But her election must be strictly made within the time designated by statute.[4] And it is to be inferred that the right of election is personal to herself, and cannot be exercised by her representatives or kindred after her death.[5]

§ 207. **Widow's Allowance.** — Another liberal provision made by the legislatures of some American States is that known as the widow's allowance. This is a reasonable sum, such as the Court of Probate may order, as necessaries to the widow for herself and the family, or, if there be no widow, to the minor children. The allowance is set apart as something superior to the claims of general creditors, and is even preferred to the expenses of administration, funeral and last illness of the husband. The amount is at the discretion of the court; and where the husband has died insolvent, leaving few assets, it is not uncommon for the whole of the personal property to be thus awarded to the widow, whereby is afforded an expeditious means of settling perplexing little estates.[6]

§ 208. **Widow's Paraphernalia.** — The widow's *paraphernalia*

Padfield *v.* Padfield, 78 Ill. 16. And see Schoul. Hus. & Wife, § 428.

[1] Mass. Stats. 1861, c. 164; Firth *v.* Denny, 2 Allen, 468; Towle *v.* Swasey, 106 Mass. 100. Similar statutes are in force in other States. White *v.* Dance, 53 Ill. 413; Stockton *v.* Wooley, 20 Ohio St. 184; Arrington *v.* Dortch, 77 N. C. 367; Cummings *v.* Cummings, 51 Mo. 261. In some States the husband now has a corresponding right of waiver under his wife's will. Schoul. Hus. & Wife, § 206.

[2] Crozier's Appeal, 90 Penn. St. 384; Register *v.* Hensley, 70 Mo. 189; *In re* Wilber, 52 Wis. 295.

[3] Register *v.* Hensley, 70 Mo. 189.

[4] Waterbury *v.* Netherland, 6 Heisk. 512. Here she had relied on the legal advice of the executor.

[5] So held in Crozier's Appeal, 90 Penn. St. 384. Otherwise in Indiana. Bratney *v.* Curry, 33 Ind. 339. In Massachusetts the right is treated as personal to the widow.

[6] Schoul. Hus. & Wife, § 430.

is a species of property recognized at the common law, though borrowed from the civilians. It consists of such articles of wearing apparel, personal ornament, and personal convenience as are suitable to a wife's rank and degree, and such as she continued to use during the marriage.[1] The term *paraphernalia* is derived from the Greeks, and transmitted to England through the civil law. But while the wife's *paraphernalia* at the civil law resembled what we call the wife's separate property, the word itself has a more limited signification in England and America, being confined to personal necessaries or ornaments, and having no possible application to real estate.[2] The common-law doctrine of *paraphernalia* is this: that the suitable ornaments and wearing apparel of a married woman, which she had at the time of her marriage, or which come to her through her husband before or during coverture, remain his personal property during his life, and he may sell and dispose of them during his life; but such as remain at the time of his death belong thenceforth to her absolutely as her *paraphernalia*.[3] It seems that he may even give them away while coverture lasts, in the exercise of his marital rights. For the loss thereof the wife cannot sue alone, but the husband sues as for his own property.[4] But he certainly cannot bequeath them to his wife; nor on principle dispose of them as *donatio causa mortis*.[5]

Paraphernalia are therefore to be distinguished from the wife's separate property, which we have considered, inasmuch as her rights are perfected only when she becomes a widow;

[1] 2 Bl. Com. 436; Macq. Hus. & Wife, 147.

[2] Blackstone says the word signified "something over and above her dower;" whereas, as a late English writer observes, it really meant something of her own, not surrendered by her at her marriage; something reserved and kept back from the *dos*, or fortune, which she brought her husband. Macq. Hus. & Wife, 152. "Dowry" may have been the word intended by Blackstone. See Schoul. Hus. & Wife, §§ 342, 343, 431. In *Re* Harrall, 31 N. J. Eq. 101, the word "paraphernalia" appears to be used as synonymous with "separate estate," ornaments, &c.

[3] Tipping *v.* Tipping, 1 P. Wms. 730; 1 Rolle, 911, L. 35; Com. Dig. Baron & Feme, Paraphernalia; Macq. Hus. & Wife, 147, 148; State *v.* Hays, 21 Ind. 288. See Rawson *v.* Pennsylvania R. R. Co., 48 N. Y. 212.

[4] Hawkins *v.* Providence R., 119 Mass. 596; McCormick *v.* Penn. Central R., 49 N. Y. 303.

[5] 2 Bl. Com. 436; Noye's Max. Ch. 49.

while the property is alienable, not by herself, but by her husband during his life.[1] Such gifts from the husband are further to be distinguished from gifts bestowed solely upon the wife by her father, or by a relative, or even by a stranger. For in the latter instance they would be deemed gifts to her separate use; and then, if received with the husband's consent, neither he nor his creditors could afterwards dispose of them.[2]

Paraphernalia would seem to be so far personal to the widow, that, if not claimed by her during her lifetime, they cannot after her death be demanded by her executor or administrator. Accordingly, it is held that if the husband should bequeath them to her for life, and then over, and she should make no election to have them as her paraphernal goods, her represen-

[1] Cro. Car. 344; Com. Dig. Baron & Feme, Paraphernalia. The *paraphernalia* differ also from the wife's pin-money. *Supra*, § 160. Married women's acts may, of course, render the wife's clothing, jewelry, &c., absolutely her own. See *supra*, c. 10.

[2] 2 Story Eq. Juris. 555. Mere ornaments for a parlor are not to be treated as paraphernal property. Graham *v.* Londonderry, 3 Atk. 393. Nor can articles be claimed as such which are, in fact, heirlooms. Calmady *v.* Calmady, 11 Vin. Abr. 181, 182. But a gold watch worn by the wife of one who maintains a fair social position may be treated as paraphernal. Tllexan *v.* Wilson, 43 Me. 186. A "necessary bed" is paraphernal. See Com. Dig. Baron & Feme, Paraphernalia. Jewels purchased by the husband, and worn by the wife with her other ornaments, it is said, become her *paraphernalia*, in absence of evidence to the contrary; while family jewels, by merely being worn by the wife, do not. Jervoise *v.* Jervoise, 17 Beav. 566 Where a piece of jewelry, in possession of the husband at the time of marriage as an heirloom, is greatly enhanced in value by adding new diamonds, and is then given to the wife to wear, though bequeathed to his heirs, the rule, as laid down by Lord Chancellor Macclesfield, is to separate the new diamonds after the husband's death, and bestow them upon the widow as her *paraphernalia*, leaving the heirs to enjoy the residue. Calmady *v.* Calmady, 11 Vin. Abr. 181, 182. And the old books say that if the husband delivers cloth to his wife for her apparel, and dies before it is made up, she shall have the cloth. 1 Rolle, 911, L. 35; Com. Dig. Baron & Feme, Paraphernalia. The question of value is not material in setting off the widow's *paraphernalia*, so long as the articles are suitable to her degree. *Ib.*; Macq. Hus. & Wife, 148. And while the modern cases which turn on such questions are rare, especially in this country, it cannot be doubted that a liberal rule would at this day be applied in the widow's favor.

As to personal ornaments, it seems to be an important element in the title, that the wife should be seen to wear them at intervals. Particularly is this true where the husband kept them in his own possession, for otherwise it might be said that he never gave them to her. But it is enough to establish her claim that he had allowed her to wear them on birthdays or other suitable occasions. Graham *v.* Londonderry, 3 Atk. 393.

tative after her decease would be excluded.[1] But in a recent English case, not only was the committee of the widow, being a lunatic, permitted to elect in her stead while she remained alive; but upon her subsequent death, her next of kin were allowed to come in and choose whether to take the *paraphernalia* or the benefits given her under her husband's will; and, upon their choice of the former, an order in chancery was made accordingly.[2]

The wife's paraphernal property is subject to her husband's debts during his life; for in truth it is not then her property at all.[3] Nor can she maintain an indictment against any one who steals it, while her husband is alive.[4] So, too, it is liable for his debts after his death, when there is a deficiency of assets in the administrator's hands.[5] But even then her necessary clothing is protected; for in the words of an ancient judicial resolution, "She ought not to be naked or exposed to shame and cold."[6] And in many of the United States there are at the present day statutes which justly reserve to the widow, in any event, necessaries in the house at the time of her husband's death, and the ornaments and clothing of herself and children.[7] If a husband pawn his wife's *paraphernalia* as collateral security for money borrowed, and give power to the lender to sell for a sum certain during his absence, this will not be deemed an absolute alienation but shall stand as a pledge redeemable by the widow; and if the husband have left sufficient to redeem (after payment of all his debts), she is entitled, under the rules of equity, to have the redemption money raised out of his personal estate.[8]

[1] Macq. Hus. & Wife, 150; Clarges *v.* Albemarle, 2 Vern. 246; Com. Dig. Baron & Feme, Paraphernalia.

[2] *In re* Hewson, 23 E. L. & Eq. 283.

[3] Tllexan *v.* Wilson, 43 Me. 186; 1 Bright Hus. & Wife, 288.

[4] State *v.* Hays, 21 Ind. 288

[5] 2 Bl. Com. 436; Macq. Hus. & Wife, 147, 149, Snelson *v.* Corbet, 3 Atk. 369; Howard *v.* Menifee, 5 Pike, 668; Ridout *v.* Earl of Plymouth, 2 Atk. 104.

[6] 1 Rolle, 911, L. 35, cited in Macq. Hus. & Wife, 147.

[7] See Mass. Gen. Stats. c. 96, §§ 4, 5; Ginochio *v* Porcella, 3 Bradf Sur. 277.

[8] Graham *v.* Londonderry, 3 Atk. 393 In *Re* Harrall, 31 N J. Eq. 101, this same rule is applied in equity to the guardian of a lunatic husband, who pawned the wife's jewels, while sane, to pay his personal expenses, the lunatic's estate being ample. Here the lunatic was still alive, which makes the case somewhat anomalous; though, *semble*, a wife's ornaments were here treated as her separate property.

But creditors must first be satisfied in all cases; though the widow's right in respect to such property is superior to that of any legatee of the husband.[1]

§ 209. **Equity of Redemption and Exoneration in Mortgages.** — We have already observed that a wife may join with her husband in executing a mortgage of her general real estate as security for his debts, and that, if this mortgage be properly foreclosed, and equities of redemption barred, her right to the real estate is gone.[2] We have also seen that the wife's separate real estate may be thus encumbered.[3] Yet the courts have gone as far as they consistently could in upholding the wife's title under such circumstances, and in allowing her all the privileges of a surety.[4] In the first place, they favor her right to the equity of redemption as against her husband; in the second place, they allow exoneration or reimbursement from her husband's estate, after his death, where the assets prove sufficient for that purpose.[5]

To the wife also belongs the right in equity to have her estate exonerated out of her husband's personal and real assets. This is known as the wife's equity of exoneration.[6]

§ 210. **Controversies between Administrator and Widow.** — Controversies between a widow and her husband's administrator are not unfrequent; and it is manifest that at the common law the widow's situation with reference to personal property, which she had brought with her into the marriage

[1] *Ib.*; Tipping *v.* Tipping, 1 P. Wms. 729; Ridout *v.* Earl of Plymouth, 2 Atk. 104; Burton *v.* Pierpont, 2 P. Wms. 80. And even though contingent assets come to hand afterwards, the wife's claim is gone. *Ib.*

Letters written to a wife by a former husband belong to her and not to his estate; and her own gift of them is valid as against the executor of such estate or her second husband. Grigsby *v.* Breckenridge, 2 Bush, 480. See, further, Schoul. Hus. & Wife, § 432, as to appropriating real estate to pay debts, before the paraphernalia can be taken.

[2] See *supra*, § 94, and cases cited.

[3] *Supra*, §§ 137, 152, and cases cited.

[4] As to these privileges, see *supra*, §§ 137, 152.

[5] See Ruscombe *v.* Hare, 6 Dow, 1; Jackson *v.* Innes, 1 Bli. 115. And see Schoul. Hus. & Wife, § 434.

[6] 2 Saund. 177; 1 Mod. 290; Robinson *v.* Gee, 1 Ves. Sen. 252, per Lord Hardwicke. See Schoul. Hus. & Wife, §§ 274, 435. The principle is that the wife, when mortgaging her property for her husband's debt, stands in the position of a surety, and therefore may claim indemnity from the principal for whose benefit her security was interposed.

state, was often extremely hard. But equity protects restriction imposed on trust funds for her benefit, even as against her own indiscreet conduct.[1] Nor are instances wanting where a widow's hasty, inconsiderate, and foolish acts with reference to property rights acquired by her in her deceased husband's estate have been deemed inoperative ; her distributive share and allowances being preserved for her by the courts as against herself, so to speak.[2]

A widow must not intermeddle with her late husband's estate, nor assume duties which properly devolve upon the executor or administrator.[3] And, when administratrix herself of her husband's estate, she is expected to enjoy the usual rights and assume the usual responsibilities pertaining to the office.[4]

§ 211. **Widow's Obligation to bury Husband.** — The common-law obligation of the widow to bury her deceased husband rests upon weaker foundations than the corresponding obligation of the husband. In truth it seems somewhat inconsistent with the doctrine of coverture ; for why, it may be asked, should a woman answer for the indigence of one whose lawful privilege it was to strip her of her own means of support ? Where the husband leaves an estate, the funeral expenses are to be paid by his executor or administrator, and not by his widow. This is the rule both in England and America ; and it is doubtless reasonable so far as it goes.[4] If the husband's estate is sufficient, it ought to bear the expense of his burial.

[1] See *e. g.* Dunn *v.* Lancaster, 4 Bush, 581 ; *Re* Peacock's Trusts, L. R. 10 Ch. D. 490 ; Schoul. Hus. & Wife, §§ 308, 437.

[2] See Maull *v.* Vaughn, 45 Ala. 134 ; Cammack *v.* Lewis, 15 Wall. 643.

[3] Keating *v.* Condon, 68 Penn. St. 75 ; Leach *v.* Prebster, 35 Ind. 415.

[4] See Ready *v.* Hamm, 46 Miss. 422 ; Fox *v.* Doherty, 30 Iowa, 334 ; Moseley *v.* Rendell, L. R. 6 Q. B. 338.

[5] 2 Redf. Wills, 224 ; 2 Wms. Ex'rs, 871 ; Macq. Hus. & Wife, 183. But in an English case, decided not many years ago, the court seemed to regard this subject somewhat differently, and intimated that husband and wife should stand upon a like footing as regarded the obligation of burying one another. Here a widow, who was also an infant, was held bound by her contract for the expense of her husband's interment. The decision proceeded upon the ingenious doctrine, that, since a husband ought to bury his wife and lawful children, who are the *personæ conjunctæ* with him, as a matter of personal benefit to himself, the wife should do the same by her husband, as a benefit and comfort to herself ; and therefore that the case comes within the rule of law which makes a contract good where the infant is a gainer by it. Chapple *v.* Cooper, 13 M. & W. 252.

§ 212. **Effect of Husband's Death upon Wife's Contracts.** — Where a married woman contracts with authority from her husband, and the husband dies suddenly, and in point of fact before certain purchases were made on his credit, is his estate liable, or is his widow; or must the creditor bear the loss? The general rule undoubtedly is that the authority of an attorney or agent expires with the principal. A dead man can have no one acting by his name and authority. And since the wife contracts only as her husband's agent at the common law, her case would seem to fall within the general doctrine.[1]

The modern inclination is clearly to relax somewhat the rigid rule of the common law of agency, and to favor the Roman doctrine, which binds the principal or his estate in respect to acts done in good faith by his agent before notice of revocation.[2]

[1] Such in fact was the ruling of the court in Blades *v.* Free, where a man who had some years cohabited with a woman, who passed as his wife, left her and her family in England, and went into foreign parts, where he died. Here it was held that the executor was not bound to pay for necessaries supplied to her after his death, although before information of the event had reached her. In this case, however, there was only a *quasi* widow, and perhaps the court felt the stigma of an illicit cohabitation. 9 B. & Cr. 167; 4 Man. & Ry. 282. But the precedent proved a stumbling-block in the next case of Smout *v.* Ilberry, 10 M. & W. 1. A man who had been in the habit of dealing with a butcher for meat supplied to his house went abroad, and his wife, who remained at home, continued the employment of the butcher. Here it was held that she was not personally liable for meat supplied after her husband's death, and purchased by her in good faith, supposing him to be still alive. The principle of the latter case seems to have been that, although the authority had expired, yet the agent was not in fault, nor in the commission of any fraud; that the revocation occurred by act of God. But the loss had to fall somewhere; so the court put it upon the butcher. These seem to be the only cases of importance on this subject in England; and we find none in this country to shed further light.

[2] Story Agency, §§ 488, 497, and notes, in 9th edition. See Bradford, surrogate of New York city, in Ginochio *v.* Porcella, 3 Bradf. Sur. 277, in which this subject is ably discussed, though the case in question, upon a close examination, appears to have decided little or nothing. This able lawyer evidently leans against the authority of Blades *v.* Free, though he expresses himself very guardedly. See, to the same purport, Terry's Appeal, 55 Penn. St. 344, where the wife had been deserted by her husband; also Schoul. Hus. & Wife, § 438. And see Stinson *v.* Prescott, 15 Gray, 335; Sterling *v.* Potts, 2 South, 773; Smith *v.* Allen, 1 Lans. 101; Carter *v.* Wann, 45 Ala. 343.

As to rights of the widow affecting settlement of her husband's estate, see, further, Schoul. Hus. & Wife, § 440–442.

§ 213. **The Widow's Dower.** — Dower and curtesy had not, perhaps, the same origin: they certainly had not, in all respects, the same incidents; but both rights were known in England from a very early period, and both have remained with very little change down to a recent date in England and America. Dower gave the widow only a life interest to the extent of one third, while curtesy gave the surviving husband the full life interest. But on the other hand, dower became absolute in the widow when she outlived her husband, while curtesy, as we have seen, never attached at all unless the husband outlived his wife and was fortunate enough to have had a child by her besides. So that in these respects the rights of husband and wife, on the whole, if not equivalent, were nearly so. And as the reader may have already inferred, the general rule as to descent of real estate has been that, subject to the widow's dower, the lands of a husband descend to his own heirs; while, subject to the surviving husband's curtesy, the lands of a wife descend to her own heirs; our policy being to preserve real estate in the family, so to speak, of the respective parties to a marriage, in default of issue capable of inheriting from both.[1]

Dower is to be defined as that provision which the law makes for a widow out of the lands or tenements of her husband. In its technical sense the word relates to real estate only. It is said to be given for her support and the nurture of her children; but it applies, in fact, whenever she is the survivor, without reference to her actual circumstances as to means of support or the burden of a family. Dower extends to all estates of inheritance which the husband has held at any period of the coverture in his own right, and which any issue of hers might, if born, possibly inherit.[2]

The three essentials of dower nearly correspond with those of curtesy; birth of issue, as we have said, not being requisite. They are marriage, seisin of the husband, and his

[1] See 1 Washb. Real Prop. 127, 147; Jenks *v.* Langdon, 21 Ohio St. 362.

[2] Co. Litt. 30 *a*; 2 Bl. Com. 130; 1 Washb. Real Prop. 146.

death. But a careful comparison of the two estates at the old law shows some inequalities.[1]

§ 214. **Homestead Rights.** — The homestead may properly be considered in connection with dower; for although this right is not strictly personal to married women, inasmuch as it exists for the benefit of both wife and children, if not for the husband besides, while he lives, it is an incumbrance upon the real estate of the husband which is generally released by the wife in connection with her dower. The homestead system is of recent origin, is peculiar to our American States, and exists for protection mainly against the husband's creditors. The policy on which it rests — by no means a new one in our legislation — is that a householder with a family shall always have a place of shelter where legal process cannot reach him. While open to some serious objections as concerns the rights of creditors, the homestead system is to be warmly commended in respect of the encouragement it affords to agriculture, and still more as offering rewards for domestic fidelity.[2]

[1] As to dower, see, in general, 1 Washb. Real Prop. 154 *et seq.*; Schoul. Hus. & Wife, §§ 445–455.

While the law of dower has been gradually fading out of sight in England, since the English Dower Act, 3 & 4 Will. IV. c. 105, limiting the interest, it attains its fuller development in this country. Curiously enough, most of the modern cases on this subject are American. Our local statutes have very generally favored the widow's rights, and unless she has joined her husband in his conveyances during his life, or statutes restrain her rights, she may usually assert the privilege at his death. But dower is found a great inconvenience in an age when real estate passes from hand to hand as an article of commercial traffic; and legislatures show some disposition to get rid of it entirely, together with curtesy. In New York the widow can only claim her dower out of lands of which her husband died seised; and such is the rule of various other States as to equitable estates at least, like an equity of redemption. In several States her interest is treated as something for the benefit of herself and children jointly. In others, the "thirds" are dispensed with, and a different rate is fixed. And finally, the State of Indiana has set a good example, which other States have followed, of abolishing both curtesy and dower, and substituting, in behalf of husband and wife, an interest in fee in one another's real estate, remaining at decease, on principles analogous to the descent and distribution of personal property of intestates; thus placing both sexes on the mutual footing of justice, and treating lands and personal estate as subject to corresponding rules. Schoul. Hus. & Wife, § 455, and appendix.

[2] See 1 Washb. Real Prop. 4th ed. 342 *et seq.*, where this system is detailed.

CHAPTER XVII.

SEPARATION AND DIVORCE.

§ 215. **Deed of Separation; General Doctrine.** — Separation is that anomalous condition of a married pair which involves a cessation of domestic intercourse, while the impediments of marriage continue. Either from choice or necessity, as the case may be, they throw aside the strong safeguards of a home and mutual companionship; they forfeit their most solemn obligations to protect, love, and cherish through life; they continue united in form and divided in fact. The spirit of the contract, all that dignifies and ennobles it, is gone; but the letter remains. Both parties submit, in some degree, at least, to the degradation of public scandal; they are cast loose upon the world without the right to love and be loved again; the thought of kindling fresh flames at the altar of domestic happiness is criminal; and deprived of the comfort and support of one another, finding in society at best but timid sympathy and consolation, the moral character must be strong, and doubly so must be that of the wife, that each may buffet with success the tide which bears onward to destruction. Such a state of things no public policy can safely favor; but the law sometimes permits it, if for no other reason than that an adequate remedy is wanting to check or to prevent the evil; and hence it may be thought more expedient for the courts to enforce such mutual contracts of the unhappy pair as mitigate their troubles, than to dabble in a domestic quarrel and try to compel unwilling companionships.

This we conceive to be the rightful position of the English and American equity courts whenever they see fit to enforce separation agreements. Some, to be sure, are disposed to

carry the argument further. Thus, recent English writers of much repute refer to the fact that divorces from bed and board are often granted in that country, and hence conclude that it is reasonable for the married parties themselves to compromise litigation, save court fees, and avoid public notoriety, and therefore to agree to live apart, just as though the court had entered a decree for that purpose.[1] But this argument proves too much; for if marriage and divorce are matters for private compromise, like ordinary contracts, why should not the discontented pair, upon just cause, agree to unloose the yoke altogether? Why should they not sometimes obtain divorce from the bonds of matrimony by collusion and default, and thus take the readiest means of avoiding scandalous and expensive suits? One shrinks from such conclusions. In fact, divorce laws do not belong to the parties themselves, but to the public; government guards the sanctity of marriage, just as it demands the duty of allegiance; only that perhaps its policy cannot be enforced in the one case as well as the other. It is because marriage is not on the footing of ordinary contracts, that husband and wife cannot, on principle, compromise, arbitrate, or modify their relationship at pleasure. Furthermore, the above argument would seem to suggest that where a complete divorce, instead of divorce from bed and board, is attainable, deeds of separation would not hold good; nor, again, where parties separate for causes which do not even justify divorce from bed and board; neither of which positions is sustained by the actual decisions.

§ 216. **The Same Subject; English Rule.** —Lord Eldon was of the opinion that a settlement by way of separate maintenance, on a voluntary separation of husband and wife, was against the policy of the law and void. The ground of his opinion was that such settlements, creating a separate maintenance by voluntary agreement between husband and wife, were in their consequences destructive to the indissoluble nature and the sanctity of the marriage contract; and he

[1] Macq. Hus. & Wife, 324 *et seq.* See also Jacob *n.* to Roper Hus. & Wife, 277; Peachey Mar. Settl. 647.

considered the question to be the gravest and most momentous to the public interest that could fall under discussion in a court of justice.[1] But in England final and complete dissolution of marriage was, until quite recently, attainable only by act of Parliament. And this method of procedure was found so difficult, expensive, and uncertain, that parties who could not live peaceably together were led to consider some lesser means of mitigating their misfortune. To be sure the ecclesiastical courts awarded sentences of divorce from bed and board; but these merely discharged the parties from the duty of cohabitation, permitting them to come together afterwards if they should so choose; and therefore, as a writer observes, these sentences "did not often, it must be owned, repay the pains bestowed in obtaining them."[2] The English ecclesiastical courts steadily refused, moreover, to recognize separation deeds.[3] Such a policy seems, however, to have turned husband and wife to their own devices for effecting the same result, with less delay and annoyance, and in order to adjust more completely those property arrangements which never could be forgotten in their misery. Deeds of settlement, trusts, and the intervention of the equity courts, readily furnished a plan of operations; and the ubiquitous conveyancer appeared once more upon the stage to open the way, through subtle refinements, to freedom for discontented couples, and emolument for himself.

After a prolonged struggle, and in spite of public policy, it is therefore fully established at length in England, as a doctrine of equity, that deeds of separation may and must, if properly framed, be carried into execution by the courts.[4] They may be enforced in the common-law courts indirectly through the medium of covenants which are entered into

[1] St. John *v.* St. John, 11 Ves. 530. See Mortimer *v.* Mortimer, 2 Hag. Consist. Rep. 318; Legard *v.* Johnson, 3 Ves. 352; Mercein *v.* People, 25 Wend. 77.

[2] Macq. Hus. & Wife, 326. See Hope *v.* Hope, 3 Jur. N. S. 456; S. C. 26 L. J. Eq. 425; Peachey Mar. Settl. 620; H. *v.* W., 3 Kay & Johns, 386, 387.

[3] 1 Bish. Mar. & Div. 5th ed. § 634; Mortimer *v.* Mortimer, 2 Hag. Con. 310; Smith *v.* Smith, 4 Hag. Ec. 609.

[4] Wilson *v.* Wilson, 1 Ho. Lords. Cas. 538; 5 Ho. Lords Cas. 59; Peachey Mar. Settl. 620, and cases cited; Macq. Hus. & Wife, 329.

between the husband and trustees; and in equity specific performance will be decreed where the stipulations are not contrary to law nor in contravention of public policy.[1] An agreement between husband and wife to live apart is, perhaps, void as against public policy; but the husband's covenant with a third party may be valid and binding, although it originates in this unauthorized state of separation and relates directly to it.[2]

It may seem strange that such an auxiliary agreement should be enforced, while the principal agreement is held contrary to the spirit and policy of the law. Lord Eldon, who strongly opposed the whole doctrine on principle, said that if the question were *res integra*, untouched by *dictum* or decision, he would not have permitted such a covenant to be the foundation of a suit in equity.[3] Sir William Grant appears to have been the first to call attention to the inconsistency of the courts in this respect; and his remark has come down through the later judges.[4] Lord Rosslyn, however, hit upon the explanation that an agreement for a separate provision between the husband and wife alone is void, merely from the general incapacity of the wife to contract;[5] an explanation which, we submit, is quite unsatisfactory. The true reason for the anomalous distinction appears to be simply this: that contracts for separation are in general void as against public policy, but that the courts saw fit to let in exceptions so far as to enforce fair covenants.

§ 217. **The Same Subject; American Rule.** — Deeds of separation were never very common in the United States. And there are at least three very good reasons why they should be at this day less encouraged than in England. The first is that our legislation strongly favors the separate control of married women as to their own acquisitions, without the

[1] Vansittart *v.* Vansittart, 2 De Gex & Jones, 249.

[2] Worrall *v.* Jacob, 3 Mer. 255; Peachey Mar. Settl. 621; Sanders *v.* Rodney, 16 Beav. 211; Warrender *v.* Warrender, 2 Cl. & Fin. 488.

[3] Westmeath *v.* Westmeath, Jac. 126; 2 Kent Com. 176.

[4] See Jones *v.* Waite, 5 Bing. 361; Frampton *v.* Frampton, 4 Beav. 293.

[5] Legard *v.* Johnson, 3 Ves. Jr. 352. See 2 Bright Hus. & Wife, 306, *n.* by Jacob.

intervention of trustees and formal deeds of settlement, thus dispensing with the necessity of intricate property arrangements. The second is that equity, ecclesiastical, and common-law functions are usually blended in the same courts of final appeal, so that a State is at liberty to adopt the precedents of the ecclesiastical rather than the modern equity tribunals of England for its guidance; while an American court, — on the other hand, could not admit clearly the right of parties to declare terms of private separation, without bringing confusion and uncertainty upon its own divorce and matrimonial jurisdiction. The third is that sentences of divorce have been procured in most of the United States with great ease, moderate expense, and little publicity.

Early in this century, Chancellor Kent summed up authorities which showed that a private separation was an illegal contract, in these emphatic words: "Nothing can be clearer or more sound than this conjugal doctrine."[1] Contrary to what until quite lately was the rule in England, many of our States have never directly sanctioned separation deeds at all. And a recent North Carolina case distinctly maintains what ought to and may yet become the pronounced American doctrine, — that separation deeds are void as against law and public policy.[2]

Nevertheless there are individual American cases, and numerous ones, where separation deeds have been recognized so far as to permit, and sometimes to require, parties to perform such marital duties as were incumbent upon them, notwithstanding the fact of separation.[3] And the text-writer must still further concede, however reluctantly, that out of a regard for permitting married parties, who are resolved upon separation without a divorce, to arrange decently for the main-

[1] 2 Kent Com. 177 *n.*

[2] Collins *v.* Collins, 1 Phill. N. C. Eq. 153.

[3] 1 Bish. Mar. & Div. § 639 *et seq.*; Schoul. Hus. & Wife, § 473; Goodrich *v.* Bryant, 4 Sneed, 325; McCubbin *v.* Patterson, 16 Md. 179; Griffin *v.* Banks, 37 N. Y. 621; Joyce *v.* McAvoy, 31 Cal. 273; Walker *v.* Stringfellow, 30 Tex. 570; Hitner's Appeal, 54 Penn. St. 110; Loud *v.* Loud, 4 Bush, 453; Dutton *v.* Dutton, 30 Ind. 452; McKee *v.* Reynolds, 26 Iowa, 578; Walker *v.* Beal, 3 Cliff. 155; Dupre *v.* Rein, 56 How. (N. Y.) Prac. 228; Deming *v.* Williams, 26 Conn 226; Chapman *v.* Gray, 8 Ga. 341.

tenance of wife and offspring, and for a just mutual disposition of property rights, our courts are in the latest cases following the English lead so as to sustain the enforcement of whatever covenants might be pronounced fair in themselves on behalf of parties separated or about to separate. Some of these cases sustain such covenants upon a suggestion that, separation being inevitable, they are prepared to make the best of it, not conceding the support of contracts calculated to favor a separation which has not yet taken place or been fully decided upon.[1] An unsatisfactory distinction truly, nor one likely to afford a resting-place ; as though this half countenance were not calculated of itself to favor future separation ; and yet a legal distinction. It seems to stop short of enforcing specific performance of a written agreement for a separation deed, and to refuse direct countenance to a stipulation that husband and wife shall live apart in time to come.

§ 218. **The Same Subject; what Covenants are upheld.** An indenture with the intervention of a trustee or trustees is in this country held the safer sort of instrument where separation is contemplated, and such are the deeds usually drawn and construed by our courts. It is desirable that the husband and trustee mutually covenant together. But so considerably are husband and wife now emancipated from the need of intermediate parties, that a fair transaction of the present nature has been sometimes sustained in certain States, where no trustee at all was interposed.[2] This cannot be affirmed of all, nor of most of the United States ;[3] nor can such a contract ever prevail against the wife's interests where she, in such negotiation and arrangements, does not appear to have acted with perfect freedom and a perfect understanding of her individual rights.[4] Sometimes an agreement or

[1] Fox *v.* Davis, 113 Mass. 255, per Endicott, J., and cases cited ; Hutton *v.* Hutton, 3 Barr, 100; Randall *v.* Randall, 37 Mich. 563, per Cooley, C. J. ; Garver *v.* Miller, 16 Ohio St. 527 ; Robertson *v.* Robertson, 25 Iowa, 350 ; Dutton *v.* Dutton, 30 Ind. 452.

[2] In Randall *v.* Randall, 37 Mich. 563, a deed passed from husband to wife, whose actual consideration was relinquishment of the right to support on her part.

[3] Simpson *v.* Simpson, 4 Dana, 140 ; Carter *v.* Carter, 14 Sm. & M. 59 ; Stephenson *v.* Osborne, 41 Miss. 119 ; McKennan *v.* Phillips, 6 Whart. 571.

[4] Switzer *v.* Switzer, 26 Gratt. 574.

bond to separate is executed by husband and wife, accompanied by the conveyance of property to a trustee for the use of the wife; which latter, however, is the instrument the court construes and upholds.[1]

Inasmuch, then, as separation deeds are not enforced either in England or the United States, at the present day, without regard to the policy of stipulations or covenants in question, the limit of judicial support may be drawn at the support of provisions which, supposing separation inevitable, carry the fulfilment of conjugal duties and rights after a reasonable and becoming manner into that relation. For equity can only sanction what is fair and beneficial; and here cognizance is taken, not of the separation, but of circumstances and a settlement attending that state. The covenant or stipulation itself, the whole settlement, must be free from exception and such as equity might, under other instances of its jurisdiction, have sustained.[2] Where, therefore, the provision is for the benefit of wife and children, as in providing suitable maintenance during the separation, such a covenant or stipulation is to be highly favored.[3] Where an equitable and suitable division is made of the property, whose benefits have been enjoyed during the coverture, this, too, may well be upheld.[4] The spouse who covenants to deliver up certain property to the other should make that covenant as advantageous to the latter as was reasonably intended.[5] It is fair that a husband's covenant or stipulation of proper allowance for the wife's support should be accompanied by the trustee's covenant or stipulation of indemnity against his wife's debts.[6] In respect of directly compelling the married parties to live

[1] Keys *v.* Keys, 11 Heisk. 425; Dixon *v.* Dixon, 23 N. J. Eq. 316.

[2] Switzer *v.* Switzer, 26 Gratt. 574.

[3] Fox *v.* Davis, 113 Mass. 255; Randall *v.* Randall, 37 Mich. 563; Walker *v.* Walker, 9 Wall. 743.

[4] Cooley, C. J., in Randall *v.* Randall, 37 Mich. 563.

[5] Thus, it is held that a husband has no right to retain copies of his wife's journals and diaries which he, under a separation deed, has covenanted to deliver up. Hamilton *v.* Hector, L. R. 13 Eq. 511. And see McAllister *v.* McAllister, 10 Heisk. 345.

[6] Dupre *v.* Rein, 56 How. (N. Y.) Prac. 228; Harshberger *v.* Alger, 31 Gratt. 52; Reed *v.* Beazley, 1 Blackf. 97. Such a provision of indemnity, though usual, is not essential. Smith *v.* Knowles, 2 Grant, 413.

apart under their agreement, separation deeds cannot be pronounced good upon any just conception of public policy and the divorce laws;[1] and especially must this rule hold true where the compusion sought is under circumstances of separation not justifying a divorce.

The potential mingling of legal and illegal conditions in these agreements, with the view of entering upon a status which of itself is inconsistent with a due fulfilment of the moral and legal duties of matrimony, occasions judicial confusion, which is more likely to increase than decrease while separation deeds are judicially recognized. But it is recently held in England that if some covenants in such a deed are legal and proper, while others are not, the former are enforceable by themselves.[2]

[1] Warrender *v.* Warrender, 2 Cl. & F. 488, 527, per Lord Brougham; Brown *v.* Peck, 1 Eden, 140; McCrocklin *v.* McCrocklin, 2 B. Monr. 370; McKennan *v.* Phillips, 6 Whart. 571, per Gibson, C. J.

Whether articles of separation can debar one from procuring a divorce for cause, see Schoul. Hus. & Wife, §§ 476, 482. If separation never took place, the deed is void. Hamilton *v.* Hector, L. R. 13 Eq. 511. As to reconciliation after separation, see Schoul. Hus. & Wife, § 478.

[2] Hamilton *v.* Hector, L. R. 13 Eq. 511.

While in many parts of the United States is seen an increasing tendency to adopt the English theory concerning separation covenants, with, however, more looseness as to the form such transactions shall take, the latest English cases quite transcend the distinctions behind which our courts take refuge, and the earlier *dicta* of their own Eldon and Brougham. Divorce being there regarded with less favor than in the United States, notwithstanding the late statutes on the subject, trust deeds and voluntary separation are, upon mature experience, treated as, on the whole, the more decent and respectable method for unhappy couples to adopt, than that somewhat novel recourse to courts, which brings a scandalous cause into public controversy. See Peachey Mar. Settl. 647, 648. English policy, indeed, in its inception is quite different from American in this regard, a fact which American jurists should bear well in mind. And under legislation of date much later than the divorce acts which were copied from the United States, separation deeds are plainly legalized. Stat. 36 & 37 Vict., cited in *Re* Besant, L. R. 11 Ch. D. 508. Thus, the custody of the offspring may now be distinctly provided for, as it would appear, in an English deed of separation. But at the same time, chancery, where the child is made a ward of the court, will protect the child's welfare. *Re* Besant, L. R. 11 Ch. D. 508; Besant *v.* Wood, L. R. 12 Ch. D. 605. See, further, Schoul. Hus. & Wife, §§ 480–482.

Upon still another point, namely, the restitution of conjugal rights, the English chancery has, of late, departed widely from its earlier precedents. In Great Britain, where this suit for restitution of conjugal rights has always been permitted, it was formerly ruled in the matrimonial courts, and seemed to be the well-settled doctrine, that a deed of separation afforded no bar to

§ 219. **Abandonment; Rights of Deserted Wife.** — Abandonment by either spouse consists in leaving the other wilfully and with the intention of causing their perpetual separation. As to the right of the wife, when abandoned by her husband, to earn, contract, sue, and be sued, to much the same effect as a *feme sole*, while such abandonment actually lasts, the current of American authority, legislative and judicial alike, decidedly favors so just a doctrine.[1] Modern married women's acts often permit the wife to do quite or nearly as much when not abandoned at all. And in England, recent statutes secure to a married woman privileges to a similar extent under like circumstances of abandonment.[2] The test is,

such a suit whenever either party chose to enforce the remedy; and this, even though the deed in terms forbade such proceedings. 1 Bish. Mar. & Div. § 634, and numerous cases cited. This was in accordance with the first idea that separation deeds might indirectly be tolerated for their beneficial covenants as concerned parties bent upon separation, but not directly upheld. That rule has changed; for, as the English statute now provides, a deed of separation which contains a covenant forbidding the suit for restitution of conjugal rights to be brought, will bar such a suit. Marshall *v.* Marshall, 39 L. T. 640. And to one separated spouse chancery will now grant an injunction, by virtue of such a covenant, to restrain the other spouse from suing for restitution of conjugal rights. Besant *v.* Wood, L. R. 12 Ch. D. 605, and cases cited. Under the English divorce act of 20 & 21 Vict. c. 85, suits for restitution of conjugal rights are still permitted. 1 Bish. Mar. & Div. § 771. Compromise, too, of the suit for restitution of conjugal rights, is permitted in England. Stanes *v.* Stanes, L. R. 3 P. D. 42. There is this fundamental distinction between the English suit for divorce or judicial separation, and the suit for restitution of conjugal rights: that in the former instance the chief object is to free the petitioner in whole or in part from the marriage obligations; but in the latter to control the other spouse so as to compel once more an unwilling cohabitation. See language of court in Firebrace *v.* Firebrace, 39 L. T. 94. Restitution of conjugal rights is a remedy unknown in the United States, where courts may finally part, but cannot forcibly reunite, the separated spouses. See Schoul. Hus. & Wife, §§ 482, 483; 1 Bish. Mar. & Div. 5th ed. § 771. And see as to specific performance of an agreement to separate, Gibbs *v.* Harding, L. R. 5 Ch. 336.

[1] See Shaw, C. J., in Abbott *v.* Bayley, 6 Pick. 89; Benadum *v.* Pratt, 1 Ohio St. 403; Spier's Appeal, 2 Casey, 233; Mead *v.* Hughes, 15 Ala. 141; Rhea *v.* Rhenner, 1 Pet. 105; Moore *v.* Stevenson, 27 Conn. 14; Schoul. Hus. & Wife, § 486, and numerous cases cited, and appendix. And see the numerous statutes in almost every State in the Union, enlarging the rights of married women in such cases.

[2] See Stat. 20 & 21 Vict. c. 85; Midland R. R. Co. *v.* Pye, 10 C. B. N. S. 179. Chancery has long moulded its proceedings to secure a like privilege. *In re* Lancaster, 23 E. L. & Eq. 127; Johnson *v.* Kirkwood, 4 Dru. & War. 379. A right of action is conferred, too, under 33 & 34 Vict. c. 93. Moore *v.* Robinson, 27 W. R. 312.

observes a recent American case, whether the husband may be deemed to have renounced his marital rights and relations.[1]

The great contrariety of current legislation is a great obstruction, however, to formulating a decided rule of English and American jurisprudence on this point. We have seen that, under the old common-law doctrine of coverture, the wife could not sue or be sued, or otherwise act as a single woman, unless the husband was under the disability of a civil death, which meant originally banishment and abjuration of the realm. The wife's rights being enlarged by statute under such circumstances, we have therefore to inquire into the scope of any statute in point. Some of our local acts are construed as affording a substitute for the common-law rule, and not as merely cumulative, and hence require a literal interpretation. In general, such legislation is to be considered as grafted upon the common law of coverture which prevailed when this country was settled, and at the Revolution. It contemplates abandonment, and not what might be designed as a merely temporary withdrawal from cohabitation; and it regards the husband in general as completely out of the jurisdiction of the State, never having entered it, or else having forsaken it.[2]

§ 220. **Divorce Legislation in General.** — Divorce laws have constantly given rise to most interesting and earnest discussions; and men differ very widely in their conclusions, while all admit the subject to be of the most vital importance to the peace of families and the welfare of nations. Some favor a rigid divorce system as most conducive to the moral health of the people; others urge a lax system on the same grounds. On two points only do English and American jurists seem to agree; first, that the government has the right to dissolve a marriage during the lifetime of both parties, provided the reasons are weighty; second, that, unless those reasons are weighty, husband and wife should be divorced only by the hand of death.[3]

[1] Ayer *v.* Warren, 47 Me. 217.

[2] See, at length, Schoul. Hus. & Wife, § 486, and appendix. And as to separate maintenance to a wife, see further, Schoul. Hus. & Wife, §§ 485, 487.

[3] Upon divorce causes and divorce

§ 221. **Effect of Absolute Divorce upon Property Rights.**— The effect of divorce from bonds of matrimony upon the property rights of married parties is substantially that of death, or rather annihilation. And, save so far as a statute may divide the property or restore to each what he or she had before, or a decree for alimony may fasten directly upon the property in question, the guilt or innocence of either spouse does not affect the case.[1] This is a topic upon which the common law, from the infrequency of divorce, furnishes no light, except by analogies. The settled usage of Parliament in granting divorce has been to introduce property clauses to the above effect into the sentence of dissolution regulating the rights and liabilities of the respective parties,[2] but even in these cases the rights of divorced parties as to tenancy by the curtesy, chattels real, and rents of the wife's lands, are still unsettled; and in general, the consequence by act of Parliament "does not very clearly appear."[3] But under the new English Divorce Act,[4] it is held in a recent case that where the wife, at the date of the decree of divorce *a vinculo*, was entitled to a reversionary interest in a sum of stock which was not settled before her marriage, and had been the subject of a postnuptial settlement; and after the decree the fund fell into possession; her divorced husband had no right to claim it.[5] The English doctrine, as thus indicated, is that the same consequences as to property must follow the decree of dissolution by the divorce court as if the marriage contract had been annihilated and the marriage tie severed on that date. Such, too, was the spirit of later decisions.[6]

procedure, see Schoul. Hus. & Wife, Part IX.; also Bish. Mar. & Div. 2 vols. *passim.*

[1] See Harvard College *v.* Head, 111 Mass. 209.

[2] Macq. Hus. & Wife, 210, 214.

[3] 2 Bright Hus. & Wife, 366.

[4] Stats. 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108; 23 & 24 Vict. c. 144.

[5] Says Vice-Chancellor Wood; "Here the contract has been determined by a mode unknown to the old law, namely, by a decree of dissolution; and, as the husband was unable, during the existence of the contract, to reduce this chattel into possession, I must hold that the property remained the property of the wife." Wilkinson *v.* Gibson, L. R. 4 Eq. 162.

[6] Pratt *v.* Jenner, L. R. 1 Ch. 493; Fussell *v.* Dowding, L. R. 14 Eq. 421; Swift *v.* Wenman, L. R. 10 Eq. 15; Prole *v.* Soady, L. R. 3 Ch. 220. And one who obtained a sentence of dissolu-

In settlements and trusts involving intricate family arrangements, however, the English rule is not yet uniform and positive.[1]

In this country the effect of divorce *a vinculo* is frequently regulated by statute. And in general, and independently of statute, all transfers of property actually executed before divorce, whether in law or in fact, remain unaffected by the decree. For instance, personal *choses* of the wife, already reduced to possession by the husband, remain his.[2] But as to rights dependent on marriage and not actually vested, a full divorce, or the legal annihilation, ends them. This applies to curtesy, dower, the right to reduce *choses* into possession, and property rights under the statutes of distribution.[3] These doctrines are set forth in local codes, which frequently save certain rights, such as the wife's dower where divorce is occasioned by her husband's misconduct. And a provision under an antenuptial contract, which is plainly intended as a substitute or equivalent for dower in case the wife survives the husband, is barred by their divorce.[4]

tion of marriage was held, moreover, not liable to be joined in an action for tort committed by his wife during the coverture. Capel *v.* Powell, 17 C. B. N. S. 743.

[1] The most recent cases show a decided indisposition to forfeit a husband's rights to a trust fund where, at all events, the effect of annihilation would be to disturb the remote right of some innocent party, or without consideration as to which spouse offended. Fitzgerald *v.* Chapman, L. R. 1 Ch. D. 563. Jessel, M. R., here discredits Fussell *v.* Dowding, and other cases cited *supra*. And see Burton *v.* Sturgeon, L. R. 2 Ch. D. 318; Codrington *v.* Codrington, L. R. 7 H. L. 854. And in certain causes the Divorce Act confers the power to modify the marriage settlement upon final sentence. 20 & 21 Vict. c. 85, § 45. Where application is made for that purpose, the judicial object of thus proceeding is, apparently, to prevent the innocent party from being injuriously affected in property by the decree. Maudslay *v.* Maudslay, L. R. 2 P. D. 256. On the decree for dissolution of marriage becoming absolute, it takes effect from the date of the decree *nisi*. Prole *v.* Soady, L. R. 3 Ch. 220.

[2] Lawson *v.* Shotwell, 27 Miss. 630.

[3] Dobson *v.* Butler, 17 Mo. 87; 4 Kent Com. 53, *n.*, 54; Given *v.* Marr, 27 Me. 112; Wheeler *v.* Hotchkiss, 10 Conn. 225; Calame *v.* Calame, 24 N. J. Eq. 440; Hunt *v.* Thompson, 61 Mo. 148; Schoul. Hus. & Wife, § 559; Rice *v.* Lumley, 10 Ohio St. 596. But see Wait *v.* Wait, 4 Comst. 95.

[4] Jordan *v.* Clark, 81 Ill. 465. Here divorce was granted to A. for the fault or misconduct of A.'s wife, but the principle of the case was that the wife could only be entitled to receive the provision as A.'s widow. A divorce *a vinculo* obtained by the wife, though for the husband's misconduct, bars dower. Calame *v.* Calame, 24 N. J. Eq. 440. And see Gleason *v.* Emerson, 51 N. H. 405; Hunt *v.* Thompson, 61 Mo. 148.

As to torts a similar rule would probably apply.[1] Separate property of a wife settled, or otherwise vested in her, is not to be disturbed by a divorce.[2]

§ 222. **Effect of Partial Divorce upon Property Rights.** — Divorce from bed and board, or *nisi*, produces, however, no such sweeping results; the cardinal doctrine here being that the marriage remains in full force, although the parties are allowed to live separate. Here we must consult the phraseology of local statutes with especial care, in order to determine the respective rights and duties of the divorced parties. Thus the consequence of judicial separation, under the present divorce acts of England, is to give to the wife, so long as separation lasts, all property of every description which she may acquire, or which may come to or devolve upon her, including estates in remainder or reversion; and such property may be disposed of by her in all respects as if she were a *feme sole;* and if she dies intestate it goes as if her husband had then been dead.[3]

In this country, independently of statutory aid, the prop-

Cf. New York statute, construed in Schiffer *v.* Pruden, 64 N. Y. 47.

[1] Chase *v.* Chase, 6 Gray, 157; 2 Bish. Mar. & Div. § 724; Schoul. Hus. & Wife, § 559. And see Capel *v.* Powell, 17 C. B. N. S. 743.

If the husband receives any property of the wife after divorce, she may recover it in a suit for money had and received. 2 Bish. Mar. & Div. 714; Legg *v.* Legg, 8 Mass. 99. See Kintzinger's Estate, 2 Ashm. 455. How far, on the divorce of the husband, his assignee may claim against the wife does not clearly appear; but where the divorce was obtained through his fault, the wife's equitable provision, it seems, will be favorably regarded as against him. 2 Bish. § 715, and conflicting cases compared; Woods *v.* Simmons, 20 Mo. 363; 2 Kent Com. 136 *et seq.* Divorce takes away the husband's right of administration upon the estate of his divorced wife. 2 Bish. Mar. & Div. 5th ed. § 725; Altemus's Case, 1 Ashm. 49. See, further, as to the effect of divorce, Schoul. Hus. & Wife, § 561, and cases cited.

[2] Barclay *v.* Waring, 58 Ga. 86; Harvard College *v.* Head, 111 Mass. 209; Schoul. Hus. & Wife, § 560; Jackson *v.* Jackson, 91 U. S. Supr. 122.

It is held, and upon that principle of sound policy which maintains inviolate the sanctity of the marriage union while discouraging stale and doubtful litigation to which their final and angry rupture might incite one of the married parties, that a divorced wife cannot maintain an action against her divorced husband upon an implied contract arising during coverture, Pittman *v.* Pittman, 4 Oreg. 298; nor for an alleged assault committed upon her while they were husband and wife, Abbott *v.* Abbott, 67 Me. 304. Such remedies, so far as available at all, ought to be sufficiently available at the time the right accrued and during marriage.

[3] Stats. 20 & 21 Vict. c. 85, § 25; 21 & 22 Vict. c. 108, § 8. See Romilly, M. R., in *Re* Insole, L. R. 1 Eq. 470.

erty rights of the parties divorced from bed and board remain in general unchanged. For this divorce is only a legal separation, terminable at the will of the parties; the marriage continuing in regard to everything not necessarily withdrawn from its operation by the divorce.[1] Thus, the husband still inherits from the wife, and the wife from the husband; the one takes his curtesy, the other her dower; and even the right of reducing the wife's *choses in action* into possession still remains to the guilty husband.[2] But chancery, by virtue of its jurisdiction in awarding the wife her equity to a settlement, may, and doubtless will, keep the property from his grasp, and do to both what justice demands.[3] On principle, the right to administer would seem not to be forfeited by one's divorce from bed and board.[4]

[1] Dean *v.* Richmond, 5 Pick. 461; 2 Bish. Mar. & Div. 5th ed. § 726 *et seq.*

[2] Clark *v.* Clark, 6 Watts & S. 85; Kriger *v.* Day, 2 Pick. 316; Smodt *v.* Lecatt, 1 Stew. 590; Ames *v.* Chew, 5 Met. 320.

[3] Holmes *v.* Holmes, 4 Barb. 295; Schoul. Hus. & Wife, §§ 161, 562, 563.

[4] But see limitations suggested in Schoul. Hus. & Wife, § 563.

The recent English statutes give the wife, upon sentence of judicial separation, the capacity to sue and be sued on somewhat the same footing as a *feme sole*. The rule in the United States is not uniform; but the tendency is clearly in the same direction. See 2 Bish. Mar. & Div. 5th ed. § 737, and cases cited; Lefevres *v.* Murdock, Wright, 205; Clark *v.* Clark, 6 Watts & S. 85. And see, further, as to statutory provisions, including a division of property, Schoul. Hus. & Wife, § 564, and appendix; 2 Bish. Mar. & Div. §§ 509–519.

Concerning the conflict of laws, with respect of (1) marriage, (2) marital rights and duties, and (3) divorce, see Schoul. Hus. & Wife, §§ 566–575. As affecting the rights and duties of the marriage relation, Story, in his Conflict of Laws, after an extended discussion of the great diversity of laws existing in different countries, as to the incidents of marriage, lays down the following primary rules, which are of general application. (1) Where parties are married in a foreign country, and there is an express contract respecting their rights and property, present and future, it will be held equally valid everywhere, unless, under the circumstances, it stands prohibited by the laws of the country where it is sought to be enforced. It will act directly on movable property everywhere. But as to immovable property in a foreign territory, it will, at most, confer only a right of action, to be enforced according to the jurisdiction *rei sitæ*. (2) Where such an express contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions. (3) Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle that movables have no *situs*, or, rather, that they accompany the person everywhere. As to immovable property the law *rei sitæ* will prevail. (4) Where there is

no change of domicile, the same rule will apply to future acquisitions as to present property. (5) But where there is a change of domicile, the law of the actual domicile, and not of the matrimonial domicile, will govern as to all future acquisitions of movable property; and, as to all immovable property, the law *rei sitæ*. Story Confl. Laws, §§ 184–187. And see Besse *v.* Pellochoux, 73 Ill. 285.

He further adds that although in a general sense the law of the matrimonial domicile is to govern in relation to the incidents and effects of marriage, yet this doctrine must be received with many qualifications and exceptions, inasmuch as no nation will recognize such incidents and effects when incompatible with its own policy or injurious to its own interests. So, too, perplexing questions will sometimes arise in determining upon the real matrimonial domicile of parties who marry *in transitu*, during a temporary residence abroad, or on a journey made for that purpose with the intention of returning. But the true principle in such cases is to consider as the real matrimonial domicile the place where, at the time of marriage, the parties intended to fix their abode, and not the place where the ceremony was in fact performed. Story Confl. Laws, §§ 189–199, and cases cited. See also 1 Burge Col. & For. Laws, 244–639; Wharton Confl. Laws, §§ 118–121, 166, 187–202; and Schoul. Hus. & Wife, § 570, *note*.

PART III.

PARENT AND CHILD.

CHAPTER I.

OF LEGITIMATE CHILDREN IN GENERAL.

§ 223. **Parent and Child in General; Children, Legitimate and Illegitimate.** — The second of the domestic relations is that of Parent and Child; a relation which results from marriage, and is, as Blackstone terms it, the most universal relation in nature.[1] Both natural and politic law, morality, and the precepts of revealed religion alike, demand the preservation of this relation in its full strength and purity. In the first period of their existence, children are a common object of affection to the parents, and draw closer the ties of their mutual affection, then comes the education of the child, in which the parents have a common care, which further identifies their sympathies and objects; the brothers and sisters of the child, when they come, bring with them new bonds of affection, new sympathies, new common objects; and the habits of a family take the place of the wishes of an individual. Thus do children give rise to affections which still further tend to bind together the community by links of iron.[2]

Children are divided into two classes, legitimate and illegitimate. The law prescribes different rights and duties for

[1] 1 Bl. Com. 447.

[2] 1 Whewell Elements of Morality, 100; 2 Kent Com. 189.

these classes.[1] It becomes proper, then, to consider them in order. *First*, then, as to legitimate children, to which topic alone the relation of parent and child in strictness applies; this will occupy several chapters.

§ 224. **Legitimate Children in General.** — A legitimate child is one who is born in lawful wedlock, or is properly brought within the influence of a valid marriage by reason of the time of birth. Legitimacy, as the word imports, will require that the child be born in a manner approved of by the law. If he is begotten during marriage and born afterwards, it is enough.[2]

§ 225. **Presumption of Legitimacy.** — The maxim of the civil law is *Pater est quem nuptiæ demonstrant;* a rule frequently cited with approval by common-law authorities, though, as we shall soon see, differently applied in some respects.[3] A distinguished Scotch jurist pronounces this "a plain and sensible maxim, which is the corner-stone, the very foundation on which rests the whole fabric of human society."[4] Boullenois, a civil-law writer, likewise commends it as "a maxim recognized by all nations, which is the peace and tranquillity of States and families."[5] This maxim implies that it is always sufficient for a child to show that he is born during the marriage. The law draws from this circumstance the necessary presumption that he is legitimate. Every child born in wedlock is presumed to be legitimate, and the child's paternity is provable by reputation.

Strong, however, as this presumption may be, it is not conclusive at law. For there may be other circumstances; such as long-continued separation of the parents; the impotence of the father; also, if the offspring be posthumous, the length of period which has elapsed since the father's death. Such circumstances might render it physically and morally

[1] 1 Bl. Com. 447.

[2] 1 Bl. Com. 447; Fraser Parent & Child, 1; 1 Burge Col. & For. Laws, 59.

[3] 1 Bl. Com. ib.; Stair III. 3, 42; 2 Kent Com. 212, *n.;* Fraser Parent & Child, 1, 2, and authorities cited; 1 Burge Col. & For. Laws, 59.

[4] Ld. Pres. Blair, in Routledge *v.* Carruthers, 19 May, 1812, cited by Fraser, *supra.*

[5] Boullenois Traité des Status, tome 1, p. 62, also cited by Fraser, *supra.*

impossible that the child was born and begotten in lawful wedlock. The civil law, therefore, admitted four exceptions to the general maxim: first, the absolute and permanent impotence of the husband; second, his accidental impotence or bodily disability; third, his absence from his wife during that period of time in which, to have been the father of the child, he must have had sexual intercourse with her; fourth, the intervention of sickness, *vel alia causa*.[1] These concluding words admit the classification to be imperfect. The common-law rule, which subsisted from the time of the Year Books down to the early part of the last century, declared the issue of every married woman to be legitimate, except in the two special cases of the impotency of the husband and his absence from the realm.[2] But in *Pendrell* v. *Pendrell* the absurd doctrine of making legitimacy rest conclusively upon the fact of the husband being *infra quatuor maria* was exploded.[3] Some Scotch jurists resolve the grounds upon which the presumption of legitimacy may be overthrown into two: first, that the husband could not have had sexual intercourse with his wife by reason of his impotency; and second, that, having the power, he had in fact no sexual intercourse with her at the time of the conception.[4] This seems to mean, first, that the husband physically could not; second, that he actually did not; but does not the second exception swallow the first? Perhaps the safer course is to abandon all attempts to classify; and to hold, with Chancellor Kent, that the question of the legitimacy or illegitimacy of the child of a married woman is one of fact, resting on decided proof as to the non-access of the husband, and that these facts must generally be left to a jury for determination.[5]

From the peculiarities attending the case of access or non-

[1] Dig. lib. 1, tit. 6, l. 6; 1 Burge Col. & For. Laws, 60.

[2] 2 Kent Com. 210; Co. Litt. 244 *a*; 1 Roll. Abr. 358.

[3] Stra. Rep. 925; 2 Kent Com. 211, and cases cited; Shelley *v.* —— (1806), 13 Ves. 56.

[4] Fraser Parent & Child, 4.

[5] 2 Kent Com. 211; 3 P. Wms. 275, 276; Harg. *n.* 193 to Co. Litt. lib. 2; Rex *v.* Luffe, 8 East, 193. And to the same effect, see Blackburn *v.* Crawfords, 3 Wall. 175.

access, legitimacy or illegitimacy, great indulgence is to be shown by the courts. Said Lord Erskine: "The law of England has been more scrupulous upon the subject of legitimacy than any other, to the extent even of disturbing the rules of reason,"[1] Still later was it asserted in English chancery that the ancient policy of the law remained unaltered; and that a child born of a married woman was to be presumed to be the child of the husband, unless there was evidence, beyond all doubt, that the husband could not be the father.[2] And it is at this day admitted that the presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but that the evidence against it ought to be strong, distinct, satisfactory, and conclusive.[3]

So far, indeed, is legitimacy favored at law, that neither husband nor wife can be a witness to prove access or non-access. This is clearly established in England;[4] and it is understood to be the law likewise in this country, though the decided cases seem to turn upon the admissibility of the wife's testimony.[5] Such evidence is treated as *contra bonos mores*. Yet the wife is an admissible witness to prove her own adultery, and in questions of pedigree; and husband and wife may prove facts, such as marriage and date of the child's birth; these may be conclusive as to illegitimacy.[6] Much testimony, extremely delicate, is also taken in bastardy and divorce proceedings. When, therefore, the courts shut their

[1] Shelley *v.* ——, 13 Ves. 56.

[2] Head *v.* Head, 1 Sim. & Stu. 150 (1823); Banbury Peerage Case, ib. 153; Pendrell *v.* Pendrell, 2 Stra. 925.

[3] Hargrave *v.* Hargrave, 9 Beav. 552; Archley *v.* Sprigg, 33 L. J. Ch. 345; Plowes *v.* Bossey, 8 Jur. N. S. 352; 10 W. R. 332.

[4] Rex *v.* Inhabitants of Sourton, 5 Ad. & El. 188; Patchett *v.* Holgate, 3 E. L. & Eq. 100; 15 Jur. 308; *In re* Rideout's Trusts, L. R. 10 Eq. 41.

[5] 2 Stark. Evid. § 404; 1 Greenl. Evid. § 344; Phillips *v.* Allen, 2 Allen, 453; People *v.* Overseers, 15 Barb. 286; Parker *v.* Way, 15 N. H. 45; Dennison *v.* Page, 29 Penn. St. 420. The father's declarations as to a son's illegitimacy are competent. Barnum *v.* Barnum, 42 Md. 251. A mother may testify that she was always true to the reputed father, her husband, and that no other man could have been the father of the child. Warlick *v.* White, 76 N. C. 175. *Semble*, such mother's truthfulness may be impeached, but not her general character for chastity. *Ib.*

[6] See 1 Greenl. Evid. §§ 343, 344; Caujolle *v.* Ferrié, 23 N. Y. 90. And see Sale *v.* Crutchfield, 8 Bush, 636; Dean *v.* State, 29 Ind. 483.

eyes so tightly against this proof of access or non-access, perhaps it is not because they are shocked, but lest they should see illegitimacy established.

To carry the presumption of legitimacy so far as to disturb the rules of reason is unjust; for no man should be saddled with the obligations of children which clearly do not belong to him. And the rule of evidence in the English courts has been severely and justly criticised, not without some good results.[1] The decision of the House of Lords in the celebrated Banbury Peerage case, proceeded upon the reasonable assumption that moral as well as physical impossibilities may affect the rule of legitimacy. Here husband and wife occupied the same house at the very time the child must have been begotten, and no case of impotency was made out, and yet that child was held not to be the child of the husband; for the testimony as to a moral impossibility was sufficiently strong notwithstanding.[2] This case was confirmed by another, where husband and wife had voluntarily separated, but the husband resided at a distance of only fifteen miles, and sometimes visited his wife; and the wife was delivered of a child, which was pronounced a bastard, from evidence of the conduct of the wife and her paramour. Here it was said, "The case, therefore, comes back to the question of fact."[3] Impotency of the husband, and his absence from the realm, suggest then but two classes of cases, and those not the only ones, where children may now be pronounced bastards.[4]

[1] 2 Kent Com. 211, *n.*; Fraser Parent & Child, 7.

[2] 1 Sim. & Stu. 153. See Nicolas on Adulterine Bastardy, 181, a volume written to show that this case overturns the old law of England.

[3] Morris *v.* Davies, 5 Cl. & Fin. 463. And see Barony of Saye & Sele, 1 Cl. & Fin. N. S. 507; Sibbett *v.* Ainsley, 3 L. T. N. S. 583, Q. B.; Fraser Parent & Child, 8; King *v.* Luffe, 8 East, 193; also, Hitchins *v.* Eardley, L. R. 2 P. & D. 248, as to admitting declarations of the person whose legitimacy is at issue.

[4] Hargrave *v.* Hargrave, 9 Beav. 552. "I apprehend," said Lord Langdale, "that evidence of every kind, direct or presumptive, may be adduced, for the purpose of showing the absence of sexual intercourse which, in cases where there has been some society, intercourse, or access, has been called non-generating access. We have, therefore, to attend to the conduct and the feelings, as evidenced by the conduct of the parties towards each other and the offspring, and even to the declarations accompanying acts, which are properly evidence. Such circumstances are of no avail against proper evidence of generating access; but they may

In this country, cases have not unfrequently arisen which involve the legitimacy of offspring; and the more reasonable doctrine favors legitimacy to about the same extent as the later English decisions.[1] The presumption of legitimacy is strongly carried, as the cases below cited indicate; though not so far as to exclude proof of non-access of the husband, or such other fact as might rebut this presumption, and show that the child of a married woman was in reality a bastard.[2]

§ 226. **Legitimation of Illicit Offspring by Subsequent Marriage.** — In respect of the legitimation of offspring by the subsequent marriage of their parents, the civil and common law systems widely differ. By the civil and canon laws, two persons who had a child as the fruit of their illicit intercourse might afterwards marry, and thus place their child to all in-

have weight, when the effect of that evidence is doubtful. If the weight is not such as to convince the minds of those who have to determine the matter, the effect may only tend to shake, without removing, the presumption of legitimacy, which in such a case must prevail."

[1] Patterson *v.* Gaines, 6 How. (U. S.) 582; 2 Kent Com. 211, and cases cited; Hemmenway *v.* Towner, 1 Allen, 209; Van Aernam *v.* Van Aernam, 1 Barb. Ch. 375; Wright *v.* Hicks, 15 Geo. 160.

[2] See Van Aernam *v.* Van Aernam, 1 Barb. Ch. 375; Kleinert *v.* Ehlers, 38 Penn. St. 439; Phillips *v.* Allen, 2 Allen, 453; Hemmenway *v.* Towner, 1 Allen, 209; State *v.* Herman, 13 Ire. 502; Tate *v.* Pene, 19 Martin, 548; Cannon *v.* Cannon, 7 Humph. 410; State *v.* Shumpert, 1 S. C. N. S. 85; Strode *v.* Magowan, 2 Bush, 621; Blackburn *v.* Crawfords, 3 Wall. 175. Collateral proof of legitimacy is not to be favored. See Kearney *v.* Denn, 15 Wall. 51. But under suitable circumstances the grant of letters of administration may be conclusive in other courts. Caujolle *v.* Ferrié, 13 Wall. 465.

Formerly, in portions of the United States, slave marriages were deemed unlawful, and the offspring illegitimate. Timmins *v.* Lacy, 30 Tex. 115. But slavery no longer exists, and the tendency of our legislation is now to uphold as far as possible former marriages of colored persons, and the legitimacy of their offspring, cohabitation continuing. See White *v.* Ross, 40 Geo. 339; Allen *v.* Allen, 8 Bush, 490; Clements *v.* Crawford, 42 Tex. 601; Daniel *v.* Sams, 17 Fla. 487; *supra*, § 17

To impugn a child's paternity, reputation of the mother for unchastity is admissible, if at all, only as to unchastity prior to connection with the reputed father. Morris *v.* Swaney, 7 Heisk. 591; Warlick *v.* White, 76 N. C. 175.

If the son was colored and the mother an Indian, the color will be presumed to have been derived from the mother rather than disturb the presumption of legitimacy. Illinois Land Co. *v.* Bonner, 75 Ill. 315. Where parents and other members of the family have long and consistently treated a child as legitimate, this affords strong presumption of legitimacy in any case. *Ib.*; Gaines *v.* Mining Co., 32 N. J. Eq. 86. But not proof indisputable. Bussom *v.* Forsyth, 32 N. J. Eq. 277.

And as to proof of marriage, see also Schoul. Hus. & Wife, §§ 38, 39.

tents and purposes on the same footing as their subsequent offspring, born in lawful wedlock.[1] But the common law, though not so strict as to require that the child should be begotten of the marriage, rendered it indispensable that the birth should be after the ceremony.[2] Let us notice this point of difference at some length.

It appears that the law of legitimation *per subsequens matrimonium* is of Roman origin; introduced and promulgated by the first Christian Emperor, Constantine, as history alleges, at the instigation of the clergy. This was an innovation upon the earlier Roman system; and the object of its introduction was to put down that matrimonial concubinage which had become so universal in the empire.[3] Justinian afterwards made this law perpetual.[4] Its first appearance in the canon law is found in two rescripts of Pope Alexander III., preserved in the Decretals of Gregory, and issued in 1180 and 1172.[5] These extended the benefits of the marriage to the offspring of carnal love, and not merely to the issue of systematic concubinage. This law of legitimation was introduced into Scotland within the range of authentic history.[6] It is also admitted, with different modifications, into the codes of France, Spain, Germany, and most other countries in Europe.[7]

The principle to which the law of legitimation *per subsequens matrimonium* is to be referred has been a subject of controversy. The canonists based the law not on general views of expediency and justice, but upon a fiction which they adopted in order to reconcile the new law with established rules; for, assuming that, as a general rule, children

[1] 2 Kent Com. 208; 1 Burge Col. & For. Laws, 92.

[2] 1 Bl. Com. 454. If the child be born after the ceremony, even though it be but a few weeks later, the presumption of paternity against the husband is almost irresistible, and the burden is on him to show affirmatively to the contrary, in order to establish the child's status as illegitimate. Gardner *v.* Gardner, 2 App. Cas. 723. Cf. *In re* Corlass, 1 Ch. D. 460.

[3] "Licita consuetudo semimatrimonium." Cod. lib. 6, tit. 57.

[4] Taylor's Civil Law, 272; Fraser Parent & Child, 32; 1 Burge Col. & For. Laws, 92, 93.

[5] Decr. IV. 17, 1; IV. 17, 6, cited in Fraser Parent & Child, 33. "Tanta est enim vis sacramenti (matrimonii) ut qui antea sunt geniti post contractum matrimonium habeantur legitimi."

[6] Fraser Parent & Child, 32, 33.

[7] 1 Burge Col. & For. Laws, 101.

are not legitimate unless born in lawful wedlock, they declared that, by a fiction of law, the parents were married when the child was born. Such reasoning, by no means uncommon in days when the wise saw more clearly what was right, than why it was so, has not stood the test of modern logic; and the Scotch courts have placed the rule once more where its imperial founders left it; namely, on the ground of general policy and justice. "Legitimation is thought to be recommended by these considerations of equity and justice, that it tends to encourage what is at first irregular and injurious to society, into the honorable relation of lawful matrimony; and that it prevents those unseemly disorders in families which are produced where the elder-born children of the same parents are left under the stain of bastardy, and the younger enjoy the status of legitimacy.[1]"

This doctrine of the civil law has found great favor in the United States. It has prevailed for many years in the States of Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri, Indiana, and Ohio.[2] So in Massachusetts, bastards are to be considered legitimate after the intermarriage of their parents and recognition by the father.[3] And similar statutes are to be found in Maine, New Hampshire, Pennsylvania, Vermont, Indiana, and elsewhere.[4]

§ 227. **Legitimation by Subsequent Marriage not favored in England.** — On the other hand, the English law has very

[1] Fraser Parent & Child, 35; Munro *v.* Munro, 1 Rob. H. L. Scotch App. 492.

[2] Griffith's Law Reg. *passim;* 1 Burge Col. & For. Laws, 101. This provision protects the offspring of an adulterous connection as well as that of parents who were free to contract marriage when the children were born. Hawbecker *v.* Hawbecker, 43 Md. 516.

[3] Mass. Gen. Sts. 1860, c. 91.

[4] Maine Laws, 1852, c. 266; Penn. Laws, 1857, May 14; Vermont R. S. 1863, c. 56; Ind. R. S. 1862, c. 46. And see Graham *v.* Bennett, 2 Cal. 503; Starr *v.* Peck, 1 Hill (N. Y.), 270; Sleigh *v.* Strider, 5 Call, 439; Dannelli *v.* Dannelli, 4 Bush, 51; Adams *v.* Adams, 36 Geo. 236; Morgan *v.* Perry, 51 N. H. 559; Brown *v.* Belmarde, 4 Kans. 41. In some States still another mode of legitimation, for inheritance, if not for all other purposes, is permitted by law as to such offspring; namely, by the father's formal declaration, or that of both parents, properly attested, which is filed in court and recorded. This might be called legitimation by public or judicial record after intermarriage of parents. See Lingen *v.* Lingen, 45 Ala. 410, 414; Pina *v.* Peck, 31 Cal. 359; Talbot *v.* Hunt, 28 La. Ann. 3. Recognition of a less formal character suffices for purposes of inheritance in Iowa. Crane *v.* Crane, 31 Iowa, 296.

strongly opposed the whole doctrine of legitimation *per subsequens matrimonium*. Even so far back as the reign of Henry III. is found a memorable instance where the peers refused to change the law in this respect, when urged to do so by the English bishops; declaring with one voice, *quod nolunt leges Angliæ mutare, quæ huc usque usitatæ sunt et approbatæ*.[1] Jealousy of canonical influence may partially account for this conduct, if not prejudice against the civil law generally. Certain it is that most English jurists have ever since stubbornly maintained the superiority of their own maxims, which place the immutability of the marriage relation above all the tender promptings of humanity towards innocent sufferers. Even Blackstone vigorously assails the civil-law doctrine, urging against it several rather artificial objections, in the apparent belief that legal consistency is better than natural justice.[2] But on the other hand, Selden mentions that the children of John of Gaunt, Duke of Lancaster, were legitimated by an act of Parliament, in the reign of Richard II., founded on some obscure common-law custom.[3]

Upon such principles it has been decided by the House of Lords, that where a marriage is in its inception unlawful, being at a time when the woman's first husband must have been alive, children born even after the time when it was presumed that the first husband had died, must be pronounced illegitimate; the mere continuance of the cohabitation after that event being insufficient, without celebration, to change the character of the connection.[4] Nor will an absolute presumption of law be raised as to the continuance of life to support such legitimacy; for in every instance the circumstances of the case must be considered.[5] And so strict is the rule, that where a person, born a bastard, becomes, by the subsequent marriage of his parents, legitimate according to

[1] Stat. of Merton, 20 Hen. III. c. 9; 2 Kent Com. 209; 1 Bl. Com. 456.

[2] 1 Bl. Com. 454, 455.

[3] Selden on Fleta, c. 9, § 2. And see Barrington, p. 38; 2 Kent Com. 209.

[4] Lapsley *v.* Grierson (1848), 1 Cl. & Fin. N. S. 498; Cunningham *v.* Cunningham, 2 Dow, 482.

[5] Lapsley *v.* Grierson, ib., explaining Rex *v.* Twyning, 2 B. & A. 386.

the laws of the country in which he was born, he is still a bastard, so far as regards the inheritance of lands in England.[1]

§ 227 *a*. **Legitimacy of Offspring born after Divorce.** — As to the status of children born after divorce, partial or complete, little can be stated from the books; for such divorces hardly existed at the common law.[2] They are probably illegitimate *prima facie*, if born of the divorced mother within an unreasonable time after separation.[3]

§ 228. **Legitimacy in Marriages Null but Bona Fide contracted.** — The issue of marriages rendered null and void are on general principles necessarily illegitimate. Opposed to this is the civil-law doctrine of putative marriages, first introduced into the canon law by Pope Innocent III.; which upholds the legitimacy of the children in cases where the parties, or either of them, *bona fide* believing that they could marry, had entered into the contract, while there was some unknown impediment existing.[4] This subject is regulated by statute to a great extent in this country, and here again our system conforms to the civil rather than the common law.[5]

§ 229. **Legitimation by the State or Sovereign.** — Legitimation by rescript of the Emperor appears in the Institutes of Justinian.[6] Still later did the Pope assume the power to grant the status of legitimacy; and in many of the canonical dispensations occur clauses of this sort.[7] The effect of these

[1] Doe d. Birtwhistle *v.* Vardill, 6 Bing. N. C. 385; 7 Cl. & Fin. 895. And see c. 6, *post*.

The only exception permitted by the common law under this general head was, that where the child whose parents subsequently married entered into possession of his father's lands after his father's death, and kept possession until his own death, so that they descended to his own issue, no disturbance of title was permitted on the plea of such child's illegitimacy. Bussom *v.* Forsyth, 32 N. J. Eq. 277.

[2] See Husband & Wife, *supra*, § 22; 2 Bish. Mar. & Div. 5th ed. § 559; Montgomery *v.* Montgomery. 3 Barb. Ch. 132.

[3] St. George *v.* St. Margaret, 1 Salk. 123; 2 Bish. Mar. & Div. § 740.

[4] Fraser Parent & Child, 22 *et seq.*; 1 Burge Col. & For. Laws, 96. See Lapsley *v.* Grierson, 1 Cl. & Fin. N. S. 498, cited *supra*.

[5] See *supra*, § 22. And see Graham *v.* Bennett, 2 Cal. 503. Yet there is a case, that of Sir Ralph Sadlier, where Parliament gave relief. See Nicolas Adult. Bast. 61–63; Fraser Parent & Child, 24; Burnett's History, book 1, c. 19; Riddell Peer & Cons. Law, 421.

[6] Nov. 74, c. 1, 2; and 89, c. 9.

[7] See Fraser Parent & Child, 43.

high-sounding clauses is now of little consequence.[1] The English Parliament, by virtue of its transcendent power, may render a bastard legitimate and capable of inheriting.[2] This same power has been claimed for the legislatures of the United States.[3] And except so far as legislative acts may come under constitutional restraints against impairing the obligation of contracts, there seems no reason why they should not be uniformly upheld.

§ 230. **Domicile of Children.** — The domicile of a child's origin is to be determined by the domicile of his parents; or, to speak more strictly, of his father. We speak at this time only of legitimate children. The domicile of origin remains until another is lawfully acquired. And since minors are not *sui juris*, they may not change their domicile during their minority, though they may when of full age; hence they retain during infancy the domicile of their parents; if the parents change their domicile, that of the infant children follows it; and if the father dies, his last domicile is that of the infant children.[4] The surviving mother may change the domicile of her minor children, provided she do so without fraudulent views to the succession of their estate; though it would appear that she cannot change it after her remarriage.[5] In general, dwelling at a certain place is *prima facie* proof

[1] See Fraser Parent & Child, 43.

[2] 1 Bl. Com. 459. And see Stat. 6 Will. IV. c. 22.

[3] Beall *v.* Beall, 8 Ga. 210; Vidal *v.* Commajere, 13 La. Ann. 516. It will be presumed that a statute of this kind confers legitimacy only so far as to give the capacity to inherit. Grubb's Appeal, 58 Penn. St. 55.

[4] Story Confl Laws, §§ 45, 46, and cases cited; 1 Burge Col. & For. Laws, 33; Abington *v.* North Bridgewater, 23 Pick. 170. Taylor *v.* Jeter, 33 Ga. 195; Daniel *v.* Hill, 52 Ala. 430; Wharton Confl. § 41. But see Ishan *v.* Gibbons, 1 Bradf. Sur. 70; Somerville *v.* Somerville, 5 Ves. 750.

[5] Potinger *v.* Wightman, 3 Mer. 67; 1 Burge Col. & For. Laws, 39; Brown *v.* Lynch, 2 Bradf. Sur. 214; Carlisle *v.* Tuttle, 30 Ala. 613. The widow's removal from the homestead must not prejudice the children's claim thereto. Showers *v.* Robinson, 43 Mich. 502. After the mother remarries, the domicile of the child ceases to change, and does not follow that of the step-father. Ryall *v.* Kennedy, 40 N. Y. Super. 347. A female infant cannot change her own domicile, even for the purpose of annulling her marriage. Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194.

Following the usual rule, however, the real estate, even of children, descends according to the law of *situs*, and the personal according to the domicile. See this applied to a child illegitimate by the rule of the *situs* in Miller *v.* Miller, 25 N. Y. Supr. 507.

that a person is domiciled there. This question of domicile may be of importance in determining the grant of administration on a deceased infant's estate, or, if the child be alive, of his guardian's appointment.

Prima facie, the infant's residence or domicile is that of his parent, and such it will remain during minority, in spite of his temporary absence at school or elsewhere. Nor can he of his own motion acquire a new domicile, since he is not a person *sui juris*.[1] But his domicile may be changed by his father, if he has one; otherwise, according to the best modern authorities, by the surviving mother until her remarriage; and perhaps even by the guardian himself, although not a relative, provided he act in good faith.[2] The intent of the parent or guardian in such cases is always material; but this intent is to be determined by facts. The original domicile of an infant is that of his parents at the time of his birth.[3]

§ 231. **Conflict of Laws as to Domicile and Legitimacy** — Some writers have said that, when the laws of two countries are in conflict, the legitimacy or illegitimacy of children is to be determined by the domicile of origin.[4] Others, again, that it is dependent upon the *lex loci* of marriage.[5] Between these writers there is no real discrepancy; for in every such case two inquiries are involved, the one whether the marriage was in itself lawful, the other whether the child was legitimate by the marriage. Of the conflict of laws regarding marriage we have already spoken.[6] That involving the status of legitimacy is now under consideration.

A conflict manifestly arises between the laws of domicile of origin and subsequent marriage, and the laws of the actual domicile or *situs* of property, where those of the one country admit legitimation *per subsequens matrimonium*, and those of the other do not. As, for instance, where children are born,

[1] Macphers. Inf. 579; Brown *v.* Lynch, 2 Bradf. 214; Story Confl. Laws, § 46.

[2] Potinger *v.* Wightman, 3 Mer. 67; 2 Kent Com. 227, 430; 1 Burge Col. & For. Laws, 39; Brown *v.* Lynch, 2 Bradf. 214.

[3] See further, *post*, Part IV. c. 5, as to Guardian & Ward.

[4] 1 Burge Col. & For. Laws, 111; Fraser Parent & Child, 45.

[5] Story Confl. Laws, § 105; Wharton Confl. §§ 35, 41.

[6] See Husband & Wife, p. 301, *supra*.

and their parents afterwards intermarry in certain of the United States, or in Scotland, and then remove with their children to England; or where such children are deemed to have acquired property rights in the last-named country. On this point there is much diversity of opinion. And the English courts have uniformly maintained their distinctive policy with considerable zeal in all doubtful cases. Thus particularly was this done in the case of *Birtwhistle* v. *Vardill*, where a child, legitimate to all purposes in Scotland, was denied the full rights of a lawful child in England.[1] Yet the law of foreign countries as to legitimacy is so far respected in England that a person illegitimate by the law of his domicile of birth will be held illegitimate in England.[2]

The doctrine of general writers is, that the status of legitimacy or illegitimacy, or the capacity to become legitimate *per subsequens matrimonium*, is governed by the law of the domicile of the child's origin.[3] And, since the domicile of origin is that of the father, the great leading fact to be ascertained in such inquiries will be generally the domicile of the father.[4] A person born before wedlock, who in the country of his birth is considered illegitimate, will not, by a subsequent marriage of his parents in another country, by whose laws such a marriage would make him legitimate, cease to be illegitimate in the country of his birth.[5] On the other hand, without a subsequent marriage of his parents, lawful by the laws of the land where celebrated, it is clear that any child must remain illegitimate, whatever be the domicile of his origin.

[1] 7 Cl. & Fin. 895; 4 Jur. 1076; ib. 5 B. & C. 438; Story Confl. Laws, § 93 *et seq.*, where the doctrine of Birtwhistle *v.* Vardill is strongly combated. See Boyes *v.* Bedale, 12 W. R. 232, before Wood, V. C.; Story Confl. Laws, 6th ed. § 93 *w*, n. by Redfield. And see Goodman *v.* Goodman, 3 Gif. 643.

[2] Munro *v.* Saunders, 6 Bligh, 468; cases cited in Birtwhistle *v.* Vardill, 9 Bligh, 52. But a foreign legitimation was so far respected in a late case that a succession tax was not laid upon the child as a stranger in blood. Skottowe *v.* Young, L. R. 11 Eq. 474.

In this country the doctrine of Birtwhistle *v.* Vardill is sometimes followed in matters of inheritance. Smith *v.* Derr, 34 Penn. St. 126. And this, notwithstanding the child was begotten in the State where the question of inheritance afterwards arose. Lingen *v.* Lingen, 45 Ala. 410. See Miller *v.* Miller, cited n. *supra*.

[3] 1 Burge Col. & For. Laws, 111. And see Skottowe *v.* Young, *supra*.

[4] Fraser Parent & Child, 45.

[5] Story Confl. Laws, § 106. See Succession of Caballero, 24 La. Ann. 573.

§ 232. **Parental Relation by Adoption.** — By adoption a *quasi* parental relation was sometimes constituted at the civil law. Adoption is the taking or choosing of another's child as one's own.[1] The adoption of children is still regulated in Germany and France, but is not generally recognized in English or American law. Adoption was not possible by our old common law. But in Massachusetts it is recently provided that under a judicial decree, rendered upon due investigation, any person may adopt as his own the child of others; and that the child so adopted shall be deemed, for the purposes of inheritance and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock.[2] In Louisiana, the laws once authorized adoption; but this was changed by the Code of 1808. Yet adoption by special act of the legislature is not unknown in that State.[3] There are other States in which adoption is now permitted, and the rights of the parent by adoption are treated substantially as those of a natural parent.[4] But our local legislation has sometimes discountenanced the adoption of a stranger as co-heir with one's own child.[5]

The method of adoption in States which permit it is pointed out by local law. In some States a written instrument must be executed and recorded.[6] In others a judicial decree, upon due notice to kindred, or their assent, is requisite.[7] Under

[1] Inst. I. 11, 1; Bouvier Law Dict. "Adoption."

[2] Mass. Gen. Sts. c. 110; Sewall *v.* Roberts, 115 Mass. 262.

[3] Vidal *v.* Commajere, 13 La. Ann. 516.

[4] Rives *v.* Sneed, 25 Ga. 612; Lunay *v.* Vantyne, 40 Vt. 501.

[5] Teal *v.* Sevier, 26 Tex. 516. See Johnson's Appeal, 88 Penn. St. 346; Wagner *v.* Varner, 50 Iowa, 532. An adopted child usually inherits from the adopting parent, and *vice versa;* but otherwise as to collateral kindred. Barnhizel *v.* Ferrell, 47 Ind. 335. Such child may inherit under a trust to one's "issue," though not where "heir of body" is the expression. Sewall *v.* Roberts, 115 Mass. 262. And see Ingram *v.* Soutten, L. R. 7 H. L. 408.

[6] Tyler *v.* Reynolds, 53 Iowa, 146.

[7] Ballard *v.* Ward, 89 Penn. St. 358. The Louisiana statutes, as to adoption, do not mean to abridge the right of a natural tutor to his minor child. Succession of Forstall, 25 La. Ann. 430. The adoption by instrument may require the surviving parent to assent. Long *v.* Hewitt, 44 Iowa, 363. But the release of parental authority is not revocable at pleasure. Jones *v.* Cleghorn, 54 Ga. 9. Equity cannot dispense with strict statute compliance as to adoption. Long *v.* Hewitt, *supra.*

A statute making an adopted child legally the child of the parents by adop-

the Roman civil law consanguinity was not, as our English common law regards it, an essential basis to the filial relation; for infants were exposed to death, and indifference to blood offspring, as well as to the ties of lawful wedlock, characterized the law of family in the decaying age of the empire. Adoption was a convenience, however, even thus, for the transmission of wealth and titles; and by adoption, moreover, we find an unfruitful couple at the present day, and in our own country, grafting the tree, in obedience to the best of parental instincts.

CHAPTER II.

THE DUTIES OF PARENTS.

§ 233. **Leading Duties of Parents enumerated.** — Three leading duties of parents as to their legitimate children are recognized at the common law: *first*, to protect; *second*, to educate; *third*, to maintain them. These duties are all enjoined by positive law; yet the law of the natural affections is stronger in upholding such fundamental obligations of the parental state.[1]

§ 234. **Duty of Protection; Defence, Personal and Legal.** — *First*, as to protection: that cover or shield from evil and injury which is afforded by the parent. This duty the stronger owes to the weaker, and especially does the father owe it to his child, so long as the latter remains comparatively helpless. This obligation may be shifted in time, as

tion is not unconstitutional unless interfering with vested rights. Sewall *v.* Roberts, 115 Mass. 262. Under the rule of comity, adoption in another State may be here recognized under suitable circumstances. Ross *v.* Ross, 129 Mass. 243. But not where the courts of that State had not jurisdiction. Foster *v.* Waterman, 124 Mass. 592. General rules of descent are not necessarily changed by statutes of adoption; but on death of an adopted child his estate goes to his blood relations. Reinders *v.* Koppelmann, 68 Mo. 482.

[1] 1 Bl. Com. 447; 2 Kent Com. 189; Taylor's Civil Law, 383; Puff. b. 4, ch. 11, §§ 4, 5.

age adds to the strength of the one, and the infirmities of the other.

It is to the credit of our civilization that the natural duty of protection is rather permitted than enjoined by any municipal laws; nature in this respect "working so strongly," to use the forcible words of Blackstone, "as to need rather a check than a spur."[1] The strongest illustration of protection at the common law which is furnished by this learned writer, — that of a father who revenged his son's injury by going near a mile and beating the offender to death with a cudgel, — though affording a questionable legal principle, as he puts it, at least shows what the verdicts of our juries are constantly confirming, that the sympathies of human tribunals are with him who defends his own offspring, even when his zeal outruns his discretion.[2]

A parent may, by the common law of England, maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels.[3] He may also justify an assault and battery committed in defence of the persons of his children.[4] On the other hand, as we shall hereafter see, where he is cruel and devoid of natural affection, his children may be taken from his personal keeping; nay, he may be subject to punishment for his own misconduct. The doctrine of parental protection seems to have required little or no special judicial discussion in modern times.

§ 235. **Duty of Education.** — *Second.* The second duty of parents is that of education; a duty which Blackstone pronounces to be far the greatest of all these in importance.[5] This importance is enhanced by the consideration that the usefulness of each new member of the human family to society depends chiefly upon his character, as developed by the training he receives in early life. Not the increase of population, but the increase of a well-ordered, intelligent,

[1] 1 Bl. Com. 450.

[2] See 1 Hawk. P. C. 83, cited in 1 Bl. Com. 450, and *n.* by Coleridge, citing Fost. 294, and 2 Ld. Raym. 1498, in opposition to Blackstone's remark.

[3] 2 Inst. 564. But a parent is not bound to employ counsel to defend the suits of his minor children. Hill *v.* Childress, 10 Yerg. 514.

[4] 1 Hawk. P. C. 131; 1 Bl. Com. 450. See *infra.*

[5] 1 Bl. Com. 450.

and honorable population, is to determine the strength of a State ; and, as a civil writer observes, the parent who suffers his child to grow up like a mere beast, to lead a life useless to others and shameful to himself, has conferred a very questionable benefit upon him by bringing him into the world.[1] Solon excused the children of Athens from maintaining their parents, if they had neglected to train them up in some art or profession.[2] So intimately is government concerned in the results of early training, that it interferes, and justly, too, both to aid the parent in giving his children a good education, and in compelling that education, where the parent himself, and not the child, is delinquent in improving the opportunities offered.[3]

Questions of parental, and more particularly religious education arise often in English law under the will of the father. It is laid down as the rule, that where one has left no direction in his will as to the religion in which his children are to be educated, it will be presumed that his wishes were that they shall be educated in his own religion.[4] Further, that the religious education of an infant of fifteen will not be changed unless the infant wishes it.[5] But no regard is paid to the wishes of a child ten years old.[6] The father is allowed to designate the plan of education to be followed with respect to his children after his death. And while, as Lord Cottenham has observed, he has no power to prescribe a particular religion to his child, yet he has indirectly the power of effecting his object by the choice of a guardian.[7]

The English courts of chancery have indeed exercised considerable jurisdiction over the education of minor wards : a topic which very seldom engages the attention of American

[1] Puff. Law of Nations, b. 6, ch. 2, § 12.

[2] Plutarch's Lives; 2 Kent Com. 195.

[3] Under existing statutes a parent may be prosecuted for neglecting to educate his child. School Board *v.* Jackson, 7 Q. B. D. 502.

[4] *In re* North, 11 Jur. 7, V. C. Bruce; Macphers. Inf. 555; Campbell *v.* Mackay, 2 Myl & Cr. 34.

[5] Witty *v.* Marshall, 1 You. & C. N. C. 68.

[6] Regina *v.* Clarke, 7 El. & B. 186. And see Hawksworth *v.* Hawksworth, L. R. 6 Ch. 539.

[7] Talbot *v.* Earl of Shrewsbury, 18 L. J. 125; Macphers. Inf. 126. See also Hill *v.* Hill, 8 Jur. N. S. 609. And see Fraser Parent & Child, 82.

tribunals. While the penal laws against Roman Catholics were in full force in England, it was considered the duty of the Court of Chancery, by analogy to the statute law, to see that all infants under its control should be brought up in the Protestant religion.[1] A case is reported in which Lord Cowper ordered a Roman Catholic girl to be sent to a Protestant school, evidently with a view to her conversion.[2] With the progress of religious toleration came a different rule of practice; and it is now a question whether, under any circumstances, the court would interfere with the testamentary guardian, and the infant's religion as designated by the father; indeed, according to many late decisions, the Roman Catholic faith appears in this respect as much favored as the Protestant.[3] But schemes of education, in cases of disagreement among guardians, are still prescribed in chancery.[4] So the rights of the guardian as judge of the place of his ward's education have been sometimes enforced in equity against the ward's own wishes.[5] And the courts are disposed to uphold the father in his reasonable views against the mother's religious convictions, or those of the children themselves.[6] Courts of chancery, in short, have jurisdiction to superintend the education of infant children. Yet the Eng-

[1] Macphers. Inf. 123; Lady Teynham's Case, 9 Mod. 40.

[2] Hill *v.* Filkin, 2 P. Wms. 5. And see Blake *v.* Leigh, Ambl. 306; Jac. 264 *n.*; *In re* Bishop, Reg. Lib. 1774, cited in Macphers. Inf. 124.

[3] Talbot *v.* Earl of Shrewsbury, 18 L. J. 125, per Lord Ch. Cottenham. And see Regina *v.* Clarke, 7 El. & B. 186; Hawksworth *v.* Hawksworth, L. R. 6 Ch. 539. But cf. Agar-Ellis *v.* Lascelles, L. R. 10 Ch. D. 49; D'Alton *v.* D'Alton, L. R. 4 P. D. 87.

[4] Campbell *v.* Mackay, 2 Myl. & Cr. 34; Macphers. Inf. 555

[5] Tremain's Case, Stra, 168; Hall *v.* Hall, 3 Atk. 721. In Tremain's case, an "infant" went to Oxford contrary to the orders of his guardian, who wished him to study at Cambridge. The court sent a messenger to carry him from Oxford to Cambridge; and upon his repeated disobedience there went another *tam* to carry him to Cambridge, *quam* to keep him there. See Macphers. Inf. 121, 141.

[6] In several late English cases, where the young children, under the mother's influence, were likely to become either Roman Catholics or Atheists, chancery interposed to carry out the father's wishes and bring them under Protestant influence; and this, notwithstanding a voluntary or judicial separation of the parents which had given the mother the children's custody. Agar-Ellis *v.* Lascelles, L. R. 10 Ch. D. 49; Besant *in re*, L. R. 11 Ch. D. 508. In D'Alton *v.* D'Alton, L. R. 4 P. D. 87, both parents had been Roman Catholics, and the father afterwards became a Protestant.

lish courts seem to have acted rather for the purpose of securing the control of the child's education to the proper person, or upholding the father's wishes, than to make independent regulations of their own according to the child's welfare.[1] In this respect, as well as in enforcing the disabilities of the law against Roman Catholics and dissenters, chancery was manifestly influenced by considerations of national policy.

Should such a subject come before the courts of this country, they might fairly take a different course, more in accordance with American legislation. Our municipal laws in general provide for the infant's educational wants; and this whole jurisdiction is one of great embarrassment and responsibility. We do not find a leading American case decided with direct and sole reference to the education of young children.[2] But there are several late decisions concerning the right of public school boards to issue general regulations concerning the admission, suspension, or dismissal of pupils. And in some States the father of a child may apply for *mandamus* against the board to compel them to admit to the public school his child, who has been unlawfully excluded.[3]

§ 236. **Duty of Maintenance in General.** — The third parental duty is that of maintenance. It is a plain precept of universal law that young and tender beings should be nurtured and brought up by their parents; and this precept have all nations enforced. So well secured is the obligation of maintenance that it seldom requires to be enforced by human laws.[4] Are we brought into this world to perish at the threshold by suffering and starvation? No; but to live and to grow. Some one, then, must enable us to do so; and upon whom more justly rests that responsibility than upon those who brought us into being? Hence, as Puffendorf observes, the duty of maintenance is laid on the parents, not only by nature herself, but by their own proper act in bringing the

[1] See 2 Story Eq. Juris. § 1342; Wellesley *v.* Wellesley. 2 Bligh N. S. 124.

[2] See the topic of Custody, *infra*; Jones *v.* Stockett, 2 Bland, 409.

[3] People *v.* Board of Education, 18 Mich. 400. See further, Burdick *v.* Babcock, 31 Iowa, 562; Hodgkins *v.* Rockport, 105 Mass. 475.

[4] 2 Kent Com. 189.

children into the world. By begetting them, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.[1]

Maintenance is that support which one person gives to another for his living. This word, used by common-law writers, corresponds with the civil-law term "aliment."[2] The obligation on the parent's part to maintain the child continues until the latter is in a condition to provide for his own maintenance; and it extends no further, at common law, than to a necessary support.[3] The Roman system carried this obligation so far that it would not suffer a parent at his death to totally disinherit his child without expressly giving his reasons for so doing.[4] And the laws of Athens were to the same purport.[5] Blackstone does not appear to approve of carrying natural obligation so far. And he cites Grotius in support of a distinction which limits the child's natural right to necessary maintenance; what is more than that, depending solely upon the favor of parents, or the positive constitutions of the municipal law.[6] Coke observes that it is "nature's provision to assist, maintain, and console the child."[7]

§ 237. **Maintenance at Common Law; Statute Provisions.** — The statute 43 Eliz. c. 2, slightly amended by 5 Geo. I. c. 8, points out the English policy in this respect. It is provided by this statute that the father and mother, grandfather and grandmother, of poor, old, blind, lame, and impotent persons, shall maintain them at their own charges, if of sufficient ability; and if a parent runs away and leaves his children, the municipal authorities, by summary judicial process, may seize upon his rents, goods, and chattels, and dispose of them toward their relief.[8] No person is bound to provide a mainte-

[1] Pnff. Law of Nations, I. 4, ch. 11; 1 Bl. Com. 447.

[2] Cf. Macphers. Inf. 210, and Fraser Parent & Child, 85.

[3] 2 Kent Com 190; 1 Bl. Com. 448.

[4] Dig. 28, 230; Nov. 115, c. 3. The statutes of some of the United States favor this doctrine to nearly the same extent. See Mass. Gen. Sts. c. 92, §§ 26, 27.

[5] 2 Potter Greek Antiq. 351.

[6] Grot. De J. B. et P., I. 2, c. 7, *n.* 3; 1 Bl. Com. 448.

[7] See 2 Kent Com. 190.

[8] 1 Bl. Com. 448; Stubb *v.* Dixon, 6 East, 166; Macphers. Inf. 210. These

nance for his issue, except where the children are impotent and unable to act, through infancy, disease, or accident, and then is only obliged to furnish them with necessaries, the penalty on refusal being no more than twenty shillings a month. "For the policy of our laws, which are ever watchful to promote industry," says Blackstone, "did not mean to compel a father to maintain his idle and lazy children in ease and indolence; but thought it unjust to oblige the parent against his will to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favors."[1] Lord Eldon, viewing the same subject afterwards in the light of equity principles, was differently impressed by these penal provisions, and founded the jurisdiction of chancery upon the very meagreness of the common-law remedies against keeping the child from starvation.[2]

The Stat. 43 Eliz. may be considered as having been transported to the United States as part of our common law. Its provisions have also been re-enacted in many of our States, as in New Hampshire, Connecticut, and South Carolina. In New York, Massachusetts, and some other States, the provision as to grandparents is omitted.[3] This feeble and scanty provision of statute law was intended, as Kent observes, for the indemnity of the public against the maintenance of paupers.[4]

In absence of special statutes to the contrary, the father-in-law is not obliged in this country to maintain his step-children, and consequently is not entitled to their earnings.[5]

statutes did not extend to illegitimates or step-children. Tubb *v.* Harrison, 4 T. R. 118; Cooper *v.* Martin, 4 East, 76. But this is changed by Stat. 4 & 5 Will. IV. c. 76.

[1] 1 Bl. Com. 449; Winston *v.* Newcomen, 6 Ad. & El. 301.

[2] "Is it," says he, "an eligible thing that children of all ranks should be placed in this situation, that they shall be in the custody of the father; although, looking at the quantum of allowance which the law can compel the father to provide for them, they may be regarded as in a state little better than that of starvation? The courts of law can enforce the rights of the father, but they are not equal to the office of enforcing the duties of the father." Wellesley *v.* Duke of Beaufort, 2 Russ. 23 (1827).

[3] 2 Kent Com. 191, and note; Dover *v.* McMurphy, 4 N. H. 162; Comm'rs of Poor *v.* Gansett, 2 Bail. 320. And see Haynes' Adm'r *v.* Waggoner, 25 Ind. 174.

[4] 2 Kent Com. 191.

[5] Commonwealth *v.* Hamilton, 6

Under the pauper acts, it is held that the father's obligation to support his vagabond son, who cannot support himself, does not accrue until after legal proceedings have been instituted; and the furnishing of previous supplies constitutes no legal consideration to support a new promise.[1] Nor is an insane mother, herself a pauper, under obligation to support a minor child, or entitled to his earnings;[2] indeed, an adult son, under some statutes, is compelled to support his mother.[3]

In general, the legal obligation of the father to maintain his child under the common law ceases as soon as the child is of age, however wealthy the father may be, unless the child becomes chargeable to the public as a pauper.[4] And as the language of Stat. 43 Eliz. rendered it inapplicable to step-children, so does it apply to blood relations only; and the husband is not liable for the expense of maintaining his wife's mother,[5] nor the father for his daughter's husband;[6] nor a man who marries for his pauper step-children.[7] But a *quasi* parental relation may sometimes be established; and one may stand *in loco parentis* to another, and thus become responsible for the maintenance and education of the latter, on the principle that the child is held out to the world as part of his family.[8]

In a state of voluntary separation, the husband *prima facie*, and not the wife, is liable for the support of children living with her; and if the wife be justified in leaving her husband's house and taking the child with her, she may pledge his credit for the child's necessaries as well as her own, so long as he neglects to make reasonable effort to regain the child's

Mass. 253, 275; Freto *v.* Brown, 4 *ib.* 675; Worcester *v.* Marchant, 14 Pick. 510; Bond *v.* Lockwood, 33 Ill. 212; c. 5, *post*.

[1] Mills *v.* Wyman, 3 Pick. 207; Loomis *v.* Newhall, 15 *ib.* 159.

[2] Jenness *v.* Emerson, 15 N. H. 486. And see Sanford *v.* Lebanon, 31 Me. 124; Farmington *v.* Jones, 36 N. H. 271.

[3] Smith *v.* Lapeer County, 34 Mich. 58; Dierkes *v.* Phila., 93 Penn. St. 270.

[4] 2 Kent Com. 192; Parish of St. Andrew *v.* De Breta, 1 Ld. Raym. 699. The father, having a fair capital, may be liable under statute for the support of his adult pauper daughter as of "sufficient ability," even though his income be less than his expenses and his health infirm. Templeton *v.* Stratton, 128 Mass. 137.

[5] Rex *v.* Munden, 1 Stra. 190.

[6] Friend *v.* Thompson, Wright, 636.

[7] Brookfield *v.* Warren, 126 Mass. 127.

[8] See *post*, c. 3, as to step-children, &c.; *supra*, § 232.

custody.[1] But the wife carries no such agency with her when divorced, though it be for the husband's fault, and from bed and board only.[2] And while in case of either separation or divorce, without orders of custody, the obligation in general continues as before, it may be materially affected by the special circumstances of each case; while an award of children to the mother should be presumed to carry with it a transfer of parental duties, as well as of parental rights.[3] But a father, as against the public and his children, cannot, it is well settled, escape the duty of providing for the children's support; even if they remain with their mother after divorce.[4]

§ 238. **Maintenance, &c., in Chancery; Allowance from Child's Fortune.** — We pass from maintenance under statute to chancery maintenance, a topic considered in connection with education. Maintenance as ordered by courts of equity, or allowed in settlement of a trust account, has grown into a topic of considerable magnitude, especially under the English system. The rule is, that where an infant has property of his own, and his father is dead, or is not able to support him, he may be maintained and educated as may be fit, out of the income of property, absolutely his own, by the person in whose hands the property is held; and a court of equity will

[1] Rumney *v.* Keyes, 7 N. H. 571; Kimball *v.* Keyes, 11 Wend. 32; Walker *v.* Laighton, 11 Fost. 111; Gill *v.* Read, 5 R. I. 343. And see Reynolds *v.* Sweetser, 15 Gray, 78; Grunhut *v.* Rosenstein, 7 Daly, 164.

[2] Hancock *v.* Merrick, 10 Cush. 41; Fitler *v.* Fitler, 33 Penn. St. 50; Burritt *v.* Burritt, 29 Barb. 124.

[3] Stanton *v.* Willson, 3 Day, 37, appears to carry the mother's right much farther; but its authority is questionable. We must admit, however, that in a late English case, presenting a strong state of facts, a woman who lived apart from her husband for sufficient cause, having with her, against her husband's will, their child, of whom a court had given her the custody, was allowed (Cockburn, C. J., dis.) to pledge the husband's credit for the child's reasonable expenses; she having no adequate means of support. Bazeley *v.* Forder, L. R. 3 Q. B. 559. See *infra*, § 239.

[4] Courtright *v.* Courtright, 40 Mich. 633; Conn *v.* Conn, 57 Ind. 323; Thomas *v.* Thomas, 41 Wis. 229; Welch's Appeal, 43 Conn. 342; Buck *v.* Buck, 60 Ill. 105. Local statutes affect this question considerably; and the award of alimony is a matter of judicial discretion in divorce suits.

When custody of a child is given to the mother on her divorce from the child's father, the latter, having no right to the child's services, is free from liability to the mother for the child's maintenance. Husband *v.* Husband, 67 Ind. 583.

allow all payments made for this purpose, which appear upon investigation to have been reasonable and proper.[1] As a general rule, the father must, if he can, maintain as well as educate his infant children, whatever their circumstances may be; and no allowance will be made him out of their property, while his own means are adequate for such purposes. This principle is clearly established, both in England and America.[2] And the strict rule of the common law regarded the parent as without legal right to reimbursement for his outlay in this direction.

But if the father is unable to maintain his children, the court of chancery will order maintenance for them out of their own property.[3] And where the question turns upon the father's ability, maintenance is given, not only in case of his bankruptcy or insolvency, but whenever it appears that he is so straitened in his circumstances that he cannot give the child a maintenance and education suitable to the child's fortune and expectations.[4] The amount of such fortune, as well as the situation, ability, and circumstances of the father, will be taken into account by the court in all such cases.

Courts now look with great liberality to the state of facts in each particular case of this kind before them. Thus, there are precedents in the English courts where the father had a large income, and yet was allowed for the maintenance of his infant children, they having an income still larger;[5] though the increasing liberality of the courts in that country is now chiefly exhibited in their construction of written directions for maintenance now so common in deeds of settlement and

[1] Macphers. Inf. 213; 2 Story Eq. Juris. § 1354.

[2] Macphers. Inf. 145, 219; Wellesley *v.* Beaufort, 2 Russ. 28; Butler *v.* Butler, 3 Atk. 60; 2 Kent Com. 191; Darley *v.* Darley, 3 Atk. 399; Cruger *v.* Heyward, 2 Desaus. 94; Matter of Kane, 2 Barb. Ch. 375; Addison *v.* Bowie, 2 Bland, 606; Harland's Case, 5 Rawle, 323; Myers *v.* Myers, 2 McCord Ch. 255, Tompkins *v.* Tompkins, 3 C. E. Green, 303; Tanner *v.* Skinner, 11 Bush, 120; Buckley *v.* Howard, 35 Tex. 565.

[3] 2 Kent Com. 191; Macphers. Inf. 220.

[4] Buckworth *v.* Buckworth, 1 Cox, 80; Macphers. Inf. 220; Newport *v.* Cook, 2 Ashm. 332; Matter of Kane, 2 Barb. Ch. 375.

[5] 2 Kent Com. 191; Jervois *v.* Silk, Coop. Eq. 52; 2 Story Eq. Juris. § 1354 *et seq.*; Greenwell *v.* Greenwell, 5 Ves. 194; Hoste *v.* Pratt, 3 Ves. 730; *Ex parte* Penleaze, 1 Bro. C. C. 387, *n.*

other instruments, by which property is secured to the infant.[1] In this country there are many instances where the father has been allowed for his child's maintenance, though not destitute. As in a case where the father was guardian of his children, labored for their support, and had been put to increased expense by the death of their mother.[2] And again, where his resources were very moderate, and the two children, young ladies, had a comfortable income between them.[3] So where the father was poor and disabled, and his daughter lived with him.[4] Chancery in all such cases endeavors to pursue the course which is best calculated to promote the permanent interest, welfare, and happiness of the children who come under its care. "And these," says Chancellor Walworth, "are not always promoted by a rigid economy in the application of their income, regardless of the habits and associations of their period of minority.[5] In other words, to liberally educate and make due use of such social advantages as the child's own means permit, is incumbent upon every judicious parent; since each child should be trained with reference to his own opportunities; and hence a child with fortune should not be straitened in his bringing up because the parent is without one. One may maintain suitable to his own condition in life, while it is fair that his children should be supported according to theirs.[6]

The father may be allowed for the expenses of past maintenance and education, if special circumstances exist; not otherwise, according to the English rule of the present day.[7] But the father's non-residence, and consequent ina-

[1] See Macphers. Inf. 221–223; Heysham *v.* Heysham, 1 Cox, 179. And see Allen *v.* Coster, 1 Beasl. 201.

[2] Harring *v.* Coles, 2 Bradf. Sur. 349.

[3] Matter of Burke, 4 Sandf. Ch. 617.

[4] Watts *v.* Steele, 19 Ala. 656. And see Godard *v.* Wagner, 2 Strobh. Eq. 1; Newport *v.* Cook, 2 Ashm. 332; Otte *v.* Becton, 55 Mo. 99; Trimble *v.* Dodd, 2 Tenn. Ch. 500; Holtzman *v.* Castleman, 2 MacArthur, 555; Baines *v.* Barnes, 64 Ala. 375. Cf. 23 N. J. Eq. 136, 296.

[5] Matter of Burke, 4 Sandf. Ch. 619.

[6] See Haase *v.* Roerschild, 6 Ind. 67; Sparhawk *v.* Sparhawk's Ex'r, 9 Vt. 41.

[7] 2 Story Eq. Juris. Redf. ed. § 1354 *a*; Carmichael *v.* Hughes, 6 E. L. & Eq. 73, per Lord Cranworth; *Ex parte* Bond, 2 Myl. & K. 439; Brown *v.* Smith, 1 L. R. 10 Ch. D. 377.

bility to make a seasonable application for maintenance, is held a special circumstance to justify such allowance.[1] While the old rule was to make no allowance for past maintenance, that rule, with the increase of wealth and liberal living, has been greatly relaxed in modern times. In this country, too, as to retrospective allowance, chancery does not appear to be very strict as concerns the parent, though special circumstances should always be chosen for making it.[2] Every such case must depend on its own facts. We apprehend that, both in England and America, maintenance would be allowed the parent from the estate of a full-grown child only on proof of some contract.[3]

A father, even if he be not in needy circumstances, may maintain his children out of any fund which is duly vested in him for that express purpose.[4] One may also contract that certain property shall be applied to the maintenance and education of his children, in which case also the contract may be enforced in his favor, without regard to the question of ability; and on this ground provisions for maintenance in an antenuptial settlement have been construed in favor of the husband and father.[5] But it is clear, from the cases, that where the fund is given as a mere bounty, notwithstanding a provision for maintenance, the father, if of ability, must support the child;[6] and this principle is extended to the father's postnuptial and voluntary settlement upon his children as distinguished from antenuptial contracts.[7] This will not prevent a court from construing such provisions in a father's favor, where the facts show that he ought, on general

[1] Carmichael *v.* Hughes, 6 E. L. & Eq. 71. And see Stopford *v.* Lord Canterbury, 11 Sim. 82; Bruin *v.* Nott, 1 Phill. 572; 1 Tamlyn, 22.

[2] Matter of Kane, 2 Barb. Ch. 375; Matter of Burke, 4 Sandf. Ch. 619; Myers *v.* Myers, 2 McCord Ch. 214; Trimble *v.* Dodd, 2 Tenn. Ch. 500; Otte *v.* Becton, 55 Mo. 99.

[3] See *In re* Cottrell's Estate, L. R. 12 Eq. 566; *infra*, c. 5; Otte *v.* Becton, 55 Mo. 99.

[4] Macphers. Inf. 220; Hawkins *v.* Watts, 7 Sim. 199; Andrews *v.* Partington, 2 Cox, 223.

[5] Mundy *v.* Earl Howe, 4 Bro. C. C. 224; Stocken *v.* Stocken, 4 Sim. 152; Macphers. Inf. 220; Ransome *v.* Burgess, L. R. 3 Eq. 773.

[6] Hoste *v.* Pratt, 3 Ves. 729; Hamley *v.* Gilbert, Jac. 354; Myers *v.* Myers, 2 McCord Ch. 255; Jones *v.* Stockett, 2 Bland, 409.

[7] *In re* Kennison's Trusts, L. R. 12 Eq. 422.

principles, to receive assistance.[1] Where the trustee for an infant, in the exercise of rightful discretion, has paid over to the father, at his request, certain sums of money out of the income of the trust property, the father being a bankrupt, it is held that no promise can be implied under such circumstances, on the part of the father, to repay to the trustee the sums of money thus applied when he afterwards becomes able to do so; there should be something to show an express promise of repayment.[2]

§ 239. **Chancery Maintenance as to Mother; Separated Parents, &c.** — The mother, after the death of the father, remains the head of the family. She has the like control over the minor children as he had when living; and she is then bound to support them, if of sufficient ability.[3] This we hold to be the rule most conformable to natural justice; though there are cases and statutes which would seem to exempt her from such obligations.[4] The statute of Elizabeth, to which we have already referred, expressly includes the mother. And since the tendency of the day is to give the mother a more equal share in the parental rights, it follows that she should assume more of the parental burdens. It is nevertheless clear that the courts show special favor to the mother, as they should; and, if the child has property, they will rather in any case charge the expenses of his education and maintenance upon such property than force her to contribute.[5] A court of chancery will not readily make the support and education of infant children a charge upon the property of their widowed mother, nor upon that of a stepfather who has not undertaken to stand in place of a father, while their own means are ample.[6]

[1] See Andrews *v.* Partington, 2 Cox, 223, commented upon in Hoste *v.* Pratt, 3 Ves. 729.

[2] Pearce *v.* Olney, 5 R. I. 269. See *In re* Stables, 13 E. L. & Eq. 61.

[3] Dedham *v.* Natick, 16 Mass. 140.

[4] Whipple *v.* Dow, 2 Mass. 415; Dawes *v.* Howard, 4 Mass. 97; 2 Kent Com. 191, and cases cited; *supra*, § 237.

[5] Ib.; Haley *v.* Bannister, 4 Madd. 275; Hughes *v.* Hughes, 1 Bro. C. C. 388. And see Lanoy *v.* Duchess of Athol, 2 Atk. 447; *Ex parte* Petre, 7 Ves. 403; Macphers. Inf. 224; Beasley *v.* Magrath, 2 Sch. & Lef. 35; Anne Walker's Matter, Cas. temp. Sugd. 299. Mother's discretion overruled. *In re* Roper's Trusts, L. R. 11 Ch. D. 272.

[6] Mowbray *v.* Mowbray, 64 Ill. 383. Where a mother has maintained her

Where the court takes away from the father the care and custody of the children, chancery does not call in aid of their own means the property of the father, and it directs maintenance out of their own fortunes, whatever may be their father's circumstances.[1] But it is held in Illinois that where infants are taken from the custody of their father, and have no property of their own, the father is bound to support them at such rate as the court may order.[2] Local statutes sometimes affect the rule in this country; while in the divorce courts an order of maintenance for children will sometimes be made on somewhat the same principle as alimony for the wife, notwithstanding the guilty husband loses their custody.[3]

If the father is alive and not able to maintain his child, maintenance will be allowed without considering the ability of the mother, though she may have a separate income.[4] And even the misconduct of the father will not always exclude him from the benefits of his child's fortune.[5]

§ 240. **Chancery Maintenance; Income; Fund.** — Courts of chancery, following a well-known principle, usually restrict the extent of a child's maintenance to the income of his property.[6] But where the property is small, and the income insufficient for his support, the court will sometimes allow the capital to be broken;[7] though rarely for the purpose of a

infant child without the order of the court, it is held that, upon his decease, she can claim for past maintenance only such sum as will effectually indemnify her for what she has spent, without reference to the amount of his fortune. Bruin *v.* Knott, 9 Jur. 979. She may have made a gift of maintenance to him so as to be precluded from claiming anything afterwards by way of recompense. *In re* Cottrell's Estate, L. R. 12 Eq. 566. But in any case the widowed mother is entitled to a reasonable allowance out of her children's estate for their maintenance, where her own means are limited. Wilkes *v.* Rogers, 6 Johns. 566; Heyward *v.* Cuthbert, 4 Desaus. 445; Osborne *v.* Van Horn, 2 Fla. 360; Bradshaw *v.* Bradshaw, 1 Russ. 528.

[1] Wellesley *v.* Duke of Beaufort, 2 Russ. 1; Macphers. Inf. 224.

[2] Cowls *v.* Cowls, 3 Gilm. 435. And see *supra*, p. 322; McCarthy *v.* Hinman, 35 Conn. 538.

[3] Milford *v.* Milford, L. R. 1 P. & D. 715; Schoul. Hus. & Wife, § 555; Wilson *v.* Wilson, 45 Cal. 399.

[4] Macphers. Inf. 224; Haley *v.* Bannister, 4 Madd. 275.

[5] Macphers. Inf. 251. See Allen *v.* Coster, 1 Beav. 202.

[6] 2 Story Eq. Juris. § 1355; Macphers. Inf. 252.

[7] *Ib.*; Barlow *v.* Grant, 1 Vern. 255; Bridge *v.* Brown, 2 You. & C. C. 181;

child's past maintenance when his future education and support will be left thereby unprovided for.[1]

We have assumed, in the cases already considered, that there was some fund in which the infants had an absolute right or interest. Where the interest is merely contingent the rule is necessarily strict.[2] Maintenance cannot be allowed to infants out of a fund which, upon the happening of the event contemplated by the testator in the bequest of the fund, will not belong to the infants but to some other person.[3]

§ 241. **Whether Child may bind Parent as Agent; Child's Necessaries.** — Let us here inquire how far the child may bind his father as agent. A father is not bound by the contracts or debts of his son or daughter, even for necessaries, as a rule, unless the circumstances show an authority actually given or to be legally inferred.[4] The principles of agency as between father and child might seem analogous to those which govern the relation of husband and wife; which last have already been considered at some length. On the one hand, the father should be compelled to discharge his legal and moral obligations as a parent, by providing suitable necessaries; on the other, he should not be prejudiced by the acts of his imprudent child.

If, then, the infant child resides at home, it is to be presumed that the father furnishes whatever is necessary and proper for his maintenance; and a proper support being rendered, under such circumstances, a third person cannot supply necessaries

Ex parte Green, 1 Jac. & W. 253; Osborne *v.* Van Horn, 2 Fla. 360; Newport *v.* Cook, 2 Ashm. 332. See *In re* Coe's Trust, 4 Kay & J. 199; Matter of Bostwick, 4 Johns. Ch. 100; Donovan *v.* Needham, 15 L. J. 193. The terms of the trust may impose special restrictions. McKnight *v.* Walsh, 23 N. J. Eq. 136.

[1] See Otte *v.* Becton, 55 Mo. 99; Cox *v.* Storts, 14 Bush, 502.

[2] *Ex parte* Kebble, 11 Ves. 604.

[3] *Ib.*; Errat *v.* Barlow, 14 Ves. 202; Turner *v.* Turner, 4 Sim. 430; Matter of Davison, 6 Paige, 136. As to rule of procedure in securing maintenance, see Macphers. Inf. 214 *et seq.*, and works on equity procedure. Maintenance is further considered under Guardian and Ward, *post*.

[4] 2 Kent Com. 192; Cromwell *v.* Benjamin, 41 Barb. 558; Gordon *v.* Potter, 17 Vt. 348; Pidgin *v.* Cram, 8 N. H. 350; Raymond *v.* Loyl, 10 Barb. 483; Tomkins *v.* Tomkins, 3 Stockt. 512; Van Valkenburg *v.* Watson, 13 Johns. 480; Mortimore *v.* Wright, 6 M. & W. 482; Kelley *v.* Davis, 49 N. H. 187.

and charge the father. So far, all is clear. Wherever the infant is *sub potestate parentis* in fact, there must be a clear and palpable omission of duty in this respect, on the part of the parent, to render him chargeable, unless he has conferred actual authority or made express contract.[1] The converse of this rule has more than once been suggested in our American courts; namely, that where the father abandons his duty, so that his infant child is forced to leave his house, he is liable for a suitable maintenance furnished the child elsewhere.[2] And upon this doctrine was a Connecticut case based many years ago, where an infant child had "eloped" from his father's house for fear of personal violence and abuse; and his necessary support and education were furnished by a stranger.[3] It must be admitted that this doctrine of an implied agency, against the father's wishes, such as the common law raises for the wife's protection, ought hardly to be extended in an equal degree to persons too young to be *sui juris;* that the theory above advanced is supported rather by *dicta* than positive adjudication; and that whenever applied, such a rule is to be justified rather by public policy than the well-understood liabilities of the father, as defined by Blackstone. We look at the reports and find that in nearly every instance the father was held to be discharged from the obligation, or else was made liable on other grounds. There can be no doubt that a parent is under a natural obligation to provide necessaries for his minor children. But how that obligation is to be enforced is not so clear.[4] In Vermont, this doctrine of implied agency, against the father's wishes, was disapproved in a case which discusses the subject fully; though the facts, it must be conceded, showed no clear omission of parental duty.[5] In fine, either an express

[1] Tomkins *v.* Tomkins, 3 Stockt. 512; Townsend *v.* Burnham, 33 N. H. 27; Clinton *v.* Rowland, 24 Barb. 634; Keaton *v.* Davis, 18 Geo. 457; Gotts *v.* Clark, 78 Ill. 229; Rogers *v.* Turner, 59 Mo. 116.

[2] Owen *v.* White, 5 Port. 435, and cases cited in the two preceding notes.

[3] Stanton *v.* Willson, 3 Day, 37. But the point decided was a different one.

[4] 1 Bl. Com. 447; Edwards *v.* Davis 16 Johns. 285; *In re* Ryder, 11 Paige 188; 2 Kent Com. 190. In New York there is some confusion of opinion. Cf. Raymond *v.* Loyl, 10 Barb. 483, with New York cases, *supra.*

[5] Gordon *v.* Potter, 17 Vt. 348.

promise, or circumstances from which a promise by the father can be inferred, is essential.[1]

The latest English decisions are clearly against allowing the child to pledge his father's credit for necessaries to enforce a moral obligation. There must be some contract, express or implied, in order to charge him. If a child be turned upon the world by his father, he can only apply to the parish, and they will compel the father, if of ability, to pay for his support. Says Lord Abinger: "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no inference in point of law."[2]

But very slight evidence may sometimes warrant the inference that a contract for the infant's necessaries is sanctioned by the father; so zealous is the court to enforce a moral obligation wherever it can. English authority to the same effect is not equally pointed;[3] but the American rule is certainly humane and liberal in this respect. Thus, the father is held bound for necessaries, where he knows the circumstances, and makes no objection.[4] And for the expenses of education and maintenance furnished on his general consent, and in his negligence.[5] So, too, being liable once to a third person, the

[1] McMillen *v.* Lee, 78 Ill. 443; Freeman *v.* Robinson, 38 N. J. L. 383; Tomkins *v.* Tomkins, 3 Stockt. 517. As to the wife's authority to bind her husband for the child's necessaries, see Schoul. Hus. & Wife, § 101; *supra*, § 61. One who encourages wife and child to live apart from the husband and father is the less entitled to recover for the necessaries of either. Schnuckle *v.* Bierman, 89 Ill. 454.

[2] Mortimore *v.* Wright, 6 M. & W. 482. And see Shelton *v.* Springett, 11 C. B 452; 20 E. L. & Eq. 281; Seaborne *v.* Maddy, 9 Car. & P. 497.

[3] Blackburn *v.* Mackey, 1 Car. & P. 1; Law *v.* Wilkin, 6 Ad. & El. 781; cases of doubtful legal authority. See Macphers. Inf. 514, 515.

[4] Swain *v.* Tyler, 26 Vt. 9; Thayer *v.* White, 12 Met. 343; Fowlkes *v.* Baker, 29 Tex. 135. As where he knew that another was boarding his minor child with expectation of reward. Clark *v.* Clark, 46 Conn. 586. Or upon written agreement with his divorced wife, who retains the children. Courtright *v.* Courtright, 40 Mich. 633.

[5] Thompson *v.* Dorsey, 4 Md. Ch. 149.

father may be held liable afterwards by implication, unless his revocation is made clear and consistently adhered to.[1] Doubtless any father may contract for supplies, necessary or unnecessary, on his child's account, if he choose to.[2]

Yet the rule of principal and agent is to be reasonably enforced; and in all cases where there appears neither palpable moral delinquency on the part of the parent, nor evidence of authority actually conferred upon his son, nor a contract by the parent himself or his other agents, the parent cannot be held liable for the general contracts of the child. A conditional offer to pay for goods ordered of a stranger by the child must have been clearly accepted in order to constitute such ratification as will bind the parent who makes it.[3] And in numerous instances have courts refused to make the father liable on the ground of an implied agency to the child.[4] So where a child has attained full age, the presumption is that he will bind himself by his own contracts. Under the latter circumstances a mere request to furnish necessaries does not bind the father, though the son be living with him; while it is very clear that the father may even thus bind himself by his own independent promise.[5]

Whenever a minor son or daughter has left the father's home, the cause should be ascertained; for the disobedience of children is not to be encouraged in any event.[6] Under the most favorable aspect of the infant's right to bind his father as agent, a third person furnishing goods must take notice, at his peril, of what is necessary for the infant according to his precise situation.[7] And the oral promise of a father to pay a

[1] Plotts *v.* Rosebury, 4 Dutch. 146; Murphy *v.* Ottenheimer, 84 Ill. 39. And see Deane *v.* Annis, 14 Me. 26. Notice to a third person may be waived afterwards by the parent's acts. Bailey *v.* King, 41 Conn. 365.

[2] Bryan *v.* Jackson, 4 Conn. 288. And see Brown *v.* Deloach, 28 Ga. 486; Deane *v.* Annis, 14 Me. 26; Harper *v.* Lemon, 38 Ga. 227.

[3] Andrews *v.* Garrett, 6 C. B. N. S. 262.

[4] Eitel *v.* Walter, 2 Bradf. Sur. 287; Raymond *v.* Loyl, 10 Barb. 483; Bushnell *v.* Bishop Hill Colony, 28 Ill. 204. See Loomis *v.* Newhall, 15 Pick. 159.

[5] Boyd *v.* Sappington, 4 Watts, 247; Patton *v.* Hassinger, 69 Penn. St. 311. And see Mills *v.* Wyman, 3 Pick. 207; Wood *v.* Gills, Coxe, 449; Norris *v.* Dodge's Adm'r, 23 Ind. 190; Kernodle *v.* Caldwell, 46 Ind. 153.

[6] Raymond *v.* Loyl, 10 Barb. 483; Angel *v.* McLellan, 16 Mass. 28; Weeks *v.* Merrow, 40 Me. 151.

[7] Van Valkenburgh *v.* Watson, 13

debt of his child not incurred for necessaries, in consideration of the creditors forbearing to sue the child must be treated as a promise to pay the debt of another, and hence, under the statute of frauds, not enforceable.[1]

§ 242. **Duty of Providing a Trade or Profession.** — The parent's duty, according to some authorities, also extends to providing the children with a profession or trade as well as a suitable education. How far the duty of competent provision extends, must depend upon the condition and circumstances of the father. Kent observes that this duty is not susceptible of municipal regulations, and is usually left to the dictates of reason and natural affection.[2]

CHAPTER III.

THE RIGHTS OF PARENTS.

§ 243. **Foundation of Parental Rights.** — The rights of parents result from their duties, being given them by law partly to aid in the fulfilment of their obligations, and partly by way of recompense.[3] As they are bound to maintain and educate, the law has given them certain authority over their children, and in the support of that authority a right to the exercise of such discipline as may be requisite for the discharge of their important trust. This is the true foundation of parental power.[4]

§ 244. **Parental Right; Chastisement; Indictment for Cruelty, &c.** — Some of the ancient nations carried the parental au-

Johns. 480; Gotts *v.* Clark, 78 Ill. 229. Cf. Murphy *v.* Ottenheimer, 84 Ill. 39.

[1] Dexter *v.* Blanchard, 11 Allen, 365. Goods being sold to the minor without the father's knowledge, order, or consent, his subsequent promise to pay therefor is without binding consideration. Freeman *v.* Robinson, 38 N. J. L. 383.

This rule of agency is sometimes allowed to operate for the parent's own benefit as against a third party; the child who could not bind himself being treated as the parent's agent. Darling *v.* Noyes, 32 Iowa, 96.

[2] 2 Kent Com. 202.

[3] 1 Bl. Com. 452.

[4] 2 Kent Com. 203.

thority beyond all natural limits. The Persians, Egyptians, Greeks, Gauls, and Romans tolerated infanticide. Under the ancient Roman laws the father had the power of life and death over his children: on the principle that he who gave had also the power to take away;[1] and thus did law attribute to man those functions which belong only to the Supreme Being. This power of the father was toned down in subsequent constitutions, and in the time of the Emperor Hadrian the wiser maxim prevailed, "*Patria potestas in pietate debet, non in atrocitate consistere;*" for which reason a father was banished who had killed his son. The Emperor Constantine made the crime capital as to adult children; and infanticide was under Valentinian and Valens punishable by death. Thus was the doctrine of paternal supremacy gradually reduced, though at the civil law never wholly abandoned.[2]

The common law, far more discreet, gives the parent only a moderate degree of authority over his child's person, which authority relaxes as the child grows older. With the progress of refinement, parents have learned to enforce obedience by kindness rather than severity; and although the courts are reluctant to interfere in matters of family discipline, they will discountenance every species of cruelty which goes by the name of parental rule. The common law gives the right of moderate correction of the child in a reasonable manner: "for," it is said, "this is for the benefit of his education."[3] But at the same time the parent must not exceed the bounds of moderation, and inflict cruel and merciless punishment; for if he do, he is liable to be punished by indictment. And he may be found guilty of manslaughter, or even murder, under gross circumstances.[4] Thus, where a father put his child, a blind and helpless boy, in a cold and damp cellar, without fire, during several days in midwinter, giving as his

[1] Cod. 8, 47, 10; 2 Bl. Com. 452.

[2] 1 Bl. Com. 452; 2 Kent Com. 204; 1 Heinec. Antiq. Rom. Jur. 9; Dr. Taylor Civ. Law, 403-406; Forsyth Custody, 3.

[3] 1 Hawk. P. C. 130; 1 Bl. Com. 452. One *in loco parentis*, as a stepfather may become, has the right of moderate correction. Gorman *v.* State, 42 Tex. 221; State *v.* Alford, 68 N. C. 322. And see, as to the analogous case of a school teacher, State *v.* Burton, 45 Wis. 150; Danenhoffer *v.* State, 69 Ind. 295.

[4] 1 Russ. Crimes, Grea. ed. 490; Regina *v.* Edwards, 8 Car. & P. 611; 2 Bish. Crim. Law, § 714.

only excuse that the boy was covered with vermin, he was rightly held subject to indictment and punishment for such wanton cruelty.[1]

So may a parent at the common law be indicted for exposure and neglect of his children; and the heinousness of the offence depends in a great measure upon the proof of simple negligence or wilful cruelty. The parent, too, who suffers his little child to starve to death, commits murder.[2] But the child's tenderness of age and helplessness are elements in such cases; and when children grow up they are presumed to provide for their urgent wants.

§ 245. **Parental Custody; Common-law Rule; English Doctrine.** — The topic of parental custody is one of absorbing importance in England and America; and its principles have received the most ample discussion in the courts of both countries. The fundamental principle of the common law was that the father possessed the paramount right to the custody and control of his minor children, and to superintend their education and nurture.[3] The mother, as such, had little or no authority in the premises.[4] The Roman law enjoined upon children the duty of showing due reverence and respect to the mother, and punished any flagrant instance of the want of it; but beyond this it seems to have recognized no claim on her part.[5] Indeed, the father is permitted by Anglo-Saxon policy to perpetuate his authority beyond his own life; for he may constitute a testamentary guardian of his infant children.[6]

In case there is no father, then the mother is entitled to the custody of the children; supposing, of course, the rights

[1] Fletcher *v.* People, 52 Ill. 395; Johnson *v.* State, 2 Humph. 283.

[2] 4 Bl. Com. 182, 183; 2 Bish. Crim. Law, §§ 688, 712; Regina *v.* White, L. R. 1 C. C. 311. Wilfully permitting a child's life to be endangered for want of proper food or medical treatment, legislation sometimes makes an indictable offence as against a parent or one in his stead. Cowley *v.* People, 83 N. Y. 464.

[3] *Ex parte* Hopkins, 3 P. Wms. 151; 2 Story Eq. Juris. §§ 1341, 1342; 2 Kent Com. 205; Forsyth Custody, 10; People *v.* Olmstead, 27 Barb. 9, and cases cited; *Ex parte* M'Clellan, 1 Dowl. P. C. 34.

[4] See 1 Bl. Com. 453.

[5] Cod. 8, tit. 47, § 4; Forsyth Custody, 5.

[6] Stat. 12 Car. II. c. 24, re-enacted in most of the United States. See Guardian and Ward, *infra*.

of no testamentary guardian intervene.[1] She has, as natural guardian, a right to the custody of the person and care of the education of her children; "and this in all countries," said Lord Hardwicke, "where the laws do not break in."[2] The priority of the surviving mother's right to custody is frequently a matter of statute regulation;[3] but her absolute right on remarriage is not so clearly recognized. Her claims, as we shall see hereafter, may conflict with those of a guardian.

§ 246. **Chancery Jurisdiction in Custody; Common Law overruled.** — Were these invariable rules, uncontrolled by the courts, unchanged by statute, this common-law doctrine of custody would be as simple of application as unjust. It is neither. And the courts of chancery, in assuming a liberal jurisdiction over the persons and estates of infants, soon made the claims of justice override all considerations of parental or rather paternal dominion, at the common law.[4] Thus Lord Thurlow, in a case where it appeared that the father's affairs were embarrassed, that he was an outlaw and resided abroad, that his son, an infant, had considerable estate, and that the mother lived apart from her husband and principally directed the child's education, restrained the father from interfering without the consent of two persons nominated for that purpose; and with reference to the objection that the court had no jurisdiction, he added that he knew there was such a notion, but he was of opinion that the court had arms long enough to reach such a case and to prevent a father from prejudicing the health or future prospects of the child; and he signified that he should act accordingly.[5] But the leading case on this subject is that of *Wellesley* v. *The Duke of Beaufort*, which went on appeal from Lord Eldon to the House of

[1] See Guardian and Ward, *infra*.

[2] Villareal *v.* Mellish, 2 Swanst. 536; Forsyth Custody, 11, 109; 2 Kent Com. 506; People *v.* Wilcox, 22 Barb. 178; Osborn *v.* Allen, 2 Dutch. 388. So where the father is sentenced to transportation. *Ex parte* Bailey, 6 Dowl. P. C. 311.

[3] 2 & 3 Vict. c. 54; Mass. Gen. Sts. c. 109, § 4; State *v.* Scott, 10 Fost. 274; Striplin *v.* Ware, 26 Ala. 87. See Heyward *v.* Cuthbert, 4 Desaus. 445.

[4] 2 Story Eq. Juris. § 1341. And see Butler *v.* Freeman, Ambl. 302.

[5] Creuze *v.* Hunter, 2 Bro. C. C. 499, *n.*; 2 Cox, 242. And see Whitfield *v.* Hales, 12 Ves. 492.

Lords; and in which the learned Lord Chancellor's judgment was unanimously affirmed.[1]

But the result of the English authorities is to establish the principle, independently of statutory provisions, that the Court of Chancery will interfere to disturb the paternal rights only in cases of a father's gross misconduct; such misconduct seeming, however, to be regarded with reference rather to the interests of the child than the moral delinquency of the parent. If the father has so conducted himself that it will not be for the benefit of the infants that they should be delivered to him, or if their being with him will injuriously affect their happiness, or if they cannot associate with him without moral contamination, or if, because they associate with him, other persons will shun their society, the court will award the custody to another.[2] It is held that chancery has nothing to do with the fact of the father's adultery, unless he brings the child into contact with the woman.[3] But unnatural crime is otherwise regarded.[4] Atheism, blasphemy, irreligion, call for interference, when the minds of young children may be there-

[1] 2 Russ. 1; Wellesley *v.* Wellesley, 2 Bligh N. S. 124.

In this latter case children were taken from a father who was living in adultery. In the course of his elaborate judgment in this case, Lord Eldon cited with approbation a *dictum* of Lord Macclesfield, to the effect that where there is reasonable ground to believe that the children would not be properly treated, the court would interfere without waiting further, upon the principle that *preventing justice* was better than *punishing justice*. Duke of Beaufort *v.* Berty, 1 P. Wms. 703, cited in Wellesley *v.* Duke of Beaufort, *supra*.

The evidence showed that the conduct of the father was of the most profligate and immoral description. It appeared that he had ill-treated his wife, continued his adulterous connection to the time of judicial proceedings, and in his letters to his young children had frequently encouraged them in habits of swearing and keeping low company. Lord Redesdale, in the course of his opinion before the House of Lords, repudiated emphatically the insinuation that paternal power is to be considered more than a trust. "Look at all the elementary writings on the subject," he adds: "they say that a father is entrusted with the care of his children; that he is entrusted with it for this reason, because it is supposed his natural affection would make him the most proper person to discharge the trust." Wellesley *v.* Wellesley, 2 Bligh, N. S. 141 (1828).

[2] Anonymous, 11 E. L. & Eq. 281; S. C. 2 Sim. N. S. 54; Forsyth Custody, 52; De Manneville *v.* De Manneville, 10 Ves. 52; Warde *v.* Warde, 2 Phil. 786.

[3] Ball *v.* Ball, 2 Sim. 35; Lord Eldon, *n.* 6 to Lyons *v.* Blenkin, Jac. 254. The English divorce act indicates the peculiar views prevalent in that country as to adultery committed by a married man. Schoul. Hus. & Wife, § 506.

[4] Anonymous, 11 E. L. & Eq. 281; S. C. 2 Sim. N. S. 34.

by poisoned and corrupted; although in matters of purely religious belief there is of course much difficulty in defining that degree of latitude which should be allowed. Says Lord Eldon, "With the religious tenets of either party I have nothing to do, except so far as the law of the country calls upon me to look on some religious opinions as dangerous to society."[1]

Mere poverty or insolvency does not furnish an adequate ground for depriving the father of his children; not even though a fund is offered for their benefit, conditioned upon the surrender of their custody.[2] Yet so solicitous is chancery for the welfare of its wards, that it seems indisposed to sacrifice their large pecuniary opportunities to the caprice of the natural protector. Thus far has chancery carried its exception, that if property be settled upon an infant, upon condition that the father surrenders his right to the custody of its person, and he, by acquiescing for a time, and permitting the child to be educated in a manner conformably to the terms of the gift or bequest, encourages corresponding expectations, he will not be allowed to disappoint them afterwards by claiming possession of the infant. He has in such a case "waived his parental right."[3]

[1] Lyons *v.* Blenkin, Jac. 256. See *supra*, pp. 295, 320, notes.

[2] *Ex parte* Hopkins, 3 P. Wms. 152; Colston *v.* Morris, Jac. 257, *n.* 11; Macphers. Inf. 142, 143; Forsyth Custody, 37; Earl & Countess of Westmeath, Jac. 251, *n. c.* But see *Ex parte* Mountfort, 15 Ves. 445.

[3] Per Lord Hardwicke, Blake *v.* Leigh, Ambl. 307; Powell *v.* Cleaver, 2 Bro. C. C. 499; Creuze *v.* Hunter, 2 Cox, 242; Forsyth Custody, 38, 53; Lyons *v.* Blenkin, Jac. 254, 262.

The English courts of common law likewise interfere in questions relating to the custody of infants by writ of *habeas corpus*, which, in general, lies to bring up persons who are in custody, and who are alleged to be subject to illegal restraint. Macphers. Inf. 152; *Ex parte* Glover, 4 Dowl. P. C. 293; Forsyth Custody, 17, 54; *In re* Pulbrook, 11 Jur. 185; *In re* Fynn, 2 De G. 457; s. c. 12 Jur. 713; Rex *v.* Greenhill, 4 Ad. & El. 624. Lord Mansfield once said that the common-law court is not bound to deliver an infant, when set free from illegal restraint, over to anybody, nor to give it any privilege. Rex *v.* Delarel, 3 Burr. 1436; 1 W. Bl. 409. But the later English rule is, that where a clear right to the custody is shown to exist in any one, the court has no choice, but must order the infant to be delivered up to him. Rex *v.* Isley, 5 Ad. & El. 441. This jurisdiction is less ample than that of the chancery courts, to whose authority it must be considered subservient. See Wellesley *v.* Wellesley, 2 Bligh, N. S. 136, 142; *Ex parte* Skinner, 9 Moore, 278.

§ 247. **Custody; English Rule; Statute.** — The English rule, up to the year 1839, was therefore that the father is entitled to the sole custody of his infant child; controllable, in general, by the court only in case of very gross misconduct, injurious to the child. Such a state of things was unjust, since it took little account of the mother's claims or feelings in a matter which most deeply interested her. This finally led to the passage of Stat. 2 & 3 Vict. c. 54, known as Justice Talfourd's Act, which introduced important changes into the law of parental custody,[1] but does not appear to have interfered with the father's right of custody further than to introduce new elements and considerations under which that right is to be exercised. This act proceeds upon three grounds: First, it assumes and proceeds upon the existence of the paternal right. Secondly, it connects the paternal right with the marital duty, and imposes the marital duty as the condition of recognizing the paternal right. Thirdly, the act regards the interest of the child.[2] If the two considerations of marital duty to be observed towards the wife and of the interest of the child can be attained consistently with the father's retaining the custody of the child, his common-law paternal right will not be disturbed; otherwise it may be.[3]

§ 248. **Parental Custody; American Rule.** — In this country the doctrine is universal that the courts of justice may, in their sound discretion, and when the morals or safety or interests of the children strongly require it, withdraw their custody from the father and confer it upon the mother, or take the children from both parents and place the care and custody of them elsewhere.[4] The rule as to legal preference is essentially that of the common law, with, however, an increasing liberality in favor of the mother, strengthened, in

[1] *Ex parte* Woodward, 17 Jur 56, Forsyth Custody, 137. See Forsyth, *ib.* 139, 140

[2] Per Turner, V. C., in *Ex parte* Woodward, 17 E. L. & Eq. 77, 17 Jur 56.

[3] *Ib.* See also Warde *v* Warde, 2 Ph. 787. Stat. 3 & 4 Vict. c. 90, empowers chancery to assign the care and custody of infants convicted of felony Under Stat. 36 & 37 Vict. c. 12, the custody of a child three years old was given to the mother, her husband having deserted her. *In re* Taylor, 4 Ch. D 157.

[4] 2 Kent Com. 205, and cases cited; 1 Story Eq Juris. § 1341.

no slight degree, by positive legislation. Our rule of procedure is somewhat different from that noticeable in the English system. For though sometimes the right of custody is to be determined by *habeas corpus*, and sometimes by proceedings in equity, while very frequently incidental to divorce suits; in any case, the circumstances will be fully considered by the court, and a decision rendered on general principles of justice.

The father has, in America, the paramount right of custody independently of all statutes to the contrary.[1] But this paramount right may be forfeited by his misconduct. Nor do the decisions in our courts go to the extent of the English rule in sustaining the husband against his wife, despite his immoral behavior or marital misconduct. "It is an entire mistake," says Judge Story, "to suppose that the court is bound to deliver over the infant to its father, or that the latter has an absolute vested right in the custody."[2] The cardinal principle relative to such matters is to regard the benefit of the infant; to make the welfare of the children paramount to the claims of either parent.[3] While States differ as to the extent of the father's claims in preference to the mother, in this latter principle they all agree; and judicial precedents, judicial *dicta*, and legislative enactments all lead to one and the same irresistible conclusion. The primary object of the American decisions is then to secure the welfare of the child, and not the special claims of one or the other parent. The English case of *Rex* v. *Greenhill*,[4] which, in effect enabling the father to take his children from his blameless wife and place them in the charge of a woman with whom he cohabited, hastened the passage of Justice Talfourd's Act,[5] has been repeatedly

[1] 2 Kent Com. 205; People *v.* Mercein, 3 Hill, 399; People *v.* Olmstead, 27 Barb. 9; Miner *v.* Miner, 11 Ill. 43; Cole *v.* Cole, 23 Iowa, 433; Henson *v.* Walts, 40 Ind. 170; Rush *v.* Vanvacter, 9 W. Va. 600; State *v.* Baird, 6 C. E. Green, 384; Smith Pet'r, 13 Ill. 138. But see Gishwiler *v.* Dodez, 4 Ohio St. 615.

[2] United States *v.* Green, 3 Mason, 382.

[3] Case of Waldron, 13 Johns. 418; People *v.* Mercein, 3 Hill, 399; *Ex parte* Schumpert, 6 Rich. 344; Wood *v.* Wood, 3 Ala. 756; Gishwiler *v.* Dodez, 4 Ohio St 615.

[4] 4 Ad. & El. 624.

[5] Forsyth Custody, 69, 137. Lord Denman, who had sat in this case, de-

condemned in the United States. Indeed, our courts have required no such statute to prevent them from taking the custody of any child from one whose parental influence, by reason of immoral character or otherwise, is found to be injurious to the child's welfare; if a father wrongs his wife, it is readily presumed that he will wrong his children likewise; and neither parent is secure in a child's custody, if custody with either is palpably against the child's own welfare.[1] The American rule is not, however, one of fixed and determined principles. Much must be left to the peculiar surroundings of each case.[2]

Proceedings as to the custody of children are usually, in this country conducted by writ of *habeas corpus*. And the settled rule with us is that, while the court is bound to free the person from illegal restraint, it is not bound to decide who is entitled to the guardianship, or to deliver infants to the custody of any particular person; but this may be done whenever deemed proper. In other words, it is in the sound discretion of the court to alter the custody of the infants, or not.[3]

§ 249. **Custody under Divorce and other Statutes.** — Our divorce jurisprudence, being, until recently, quite different from that of England, further opportunity has been furnished for a departure from the common-law rules which favor the paternal right of custody. The same tribunal which hears the divorce cause has power to direct with whom of the parties, or what third person, the children shall be.[4] Like

clared that there was not one of the court who had not felt ashamed at the state of the law. See *ib.* 69 *n.*

[1] Bedell *v.* Bedell, 1 Johns. Ch. 604; Barrere *v.* Barrere, 4 Johns. Ch. 187, 197; 2 Bish. Mar. & Div. 5th ed. § 532; *Ex parte* Schumpert, 6 Rich. 344; People *v.* Chegaray, 18 Wend. 637; Garner *v.* Gordon, 41 Ind. 92; Corrie *v.* Corrie, 42 Mich. 509.

[2] Cook *v.* Cook, 1 Barb. Ch. 639; Dailey *v.* Dailey, Wright, 514; Commonwealth *v.* Addicks, 2 S. & R. 174.

[3] Commonwealth *v.* Addicks, 5 Binn. 520; Armstrong *v.* Stone, 9 Gratt. 102; Case of Waldron, 13 Johns. 418; State *v.* Smith, 6 Me. 462; State *ex rel.* *v.* Paine, 4 Humph. 523; Commonwealth *v.* Briggs, 16 Pick. 203; Ward *v.* Roper, 7 Humph. 111; Foster *v.* Alston, 6 How. (Miss.) 406; Stigall *v.* Turney, 2 Zabr. 286; Mercein *v.* People, 25 Wend. 64; State *v.* King, 1 Ga. Dec. 93; State *v.* Banks, 25 Ind. 495; Bennet *v.* Bennet, 2 Beasl. 114; *Ex parte* Williams, 11 Rich. 452; State *v.* Richardsou, 40 N. H. 272.

[4] 2 Bish. Mar. & Div. 5th ed. §§ 526, 530.

powers are now conferred upon the English matrimonial court by recent statutes; and the child's custody may be given to a parent or a third person; generally to the innocent parent, though with due regard to the child's welfare; and, in suitable cases, with a right of access to the parent or parents deprived of custody.[1] Where the custody of a child is the subject of chancery or divorce proceedings, the court will often be justified in making temporary arrangements for his custody.[2]

[1] Stats. 20 & 21 Vict. c. 85, § 35; 22 & 23 Vict. c. 61, § 4. See Ahrenfeldt *v.* Ahrenfeldt, 1 Hoff. Ch. 497; Spratt *v.* Spratt, 1 Swab. & T. 215; 2 Bish. Mar. & Div. 5th ed. §§ 532-544, and cases cited; Bedell *v.* Bedell, 1 Johns. Ch. 604; Chetwynd *v.* Chetwynd, L. R. 1 P. & D. 39; Harding *v.* Harding, 22 Md. 337; Mallinson *v.* Mallinson, L. R. 1 P. & D. 221; McBride *v.* McBride, 1 Bush, 15; Goodrich *v.* Goodrich, 44 Ala. 670; Bush *v.* Bush, 37 Ind. 164; Harvey *v.* Lane, 66 Me. 536; Hill *v.* Hill, 49 Md. 450. The father is strongly preferred to the mother where he obtained divorce for her desertion. Carr *v.* Carr, 22 Gratt. 168. See *In re* Taylor, 4 Ch. D. 157. Even after divorce with a decree of custody to one parent, occasion may arise for separating the child, in the latter's interest, from both parents, as concerns custody. D'Alton *v.* Alton, L. R. 4 P. D. 87; *In re* Bort, 25 Kan. 306.

[2] Hutson *v.* Townsend, 6 Rich. Eq. 249; Barnes *v.* Barnes, L. R. 1 P. & D. 463; *Re* Welch, 74 N. Y. 299.

Some American statutes concerning custody are worthy of notice. Following the temper of the times, the New York legislature of 1860 enacted that "every married woman is hereby constituted and declared to be the joint guardian of her children, with her husband, with equal powers, rights, and duties in regard to them with her husband." Such a statute, unexplained, might seem to do away altogether with the paramount claims of the husband. But the courts appeared disposed to regard the innovation with little favor; and the law was in 1862 repealed. People *v.* Brooks, 35 Barb. 85; People *v.* Boice, 39 Barb. 307. In the former case a married woman, who lived apart from her husband, no misconduct on his part being shown, sought under the the new statute to obtain custody of the children. An earlier statute of New York provides that if the parents live in a state of separation, without being divorced, and without the fault of the wife, the courts may, on her application, award the custody of the child to the mother. 2 N.Y. Rev. Sts. 148; 2 Kent Com. 205, *n.*; People *v.* Mercein, 3 Hill, 399. The discretion thus conferred upon the courts is a judicial one, however, and is to be exercised with due reference to the cause of separation, and the conduct and character of the parties. And see People *v.* Brooks, *supra*. See N. Y. act 1862, c. 172, § 6, which restrains the father from binding his child as apprentice, or parting with his control, or creating a testamentary guardian, without the mother's written assent. Legislative provisions of a like tendency are frequently to be met with in other States. Thus in Massachusetts, it is enacted that, pending divorce controversies, the respective rights of the parents shall, in the absence of misconduct, be regarded as equal, and that the happiness and welfare of the children shall determine the custody in which they shall be placed. Mass. Gen. Sts. c. 107, § 37. And under a still more recent statute in New Jersey, the court is to a certain

§ 250. **Custody of Minors; Child's own Wishes.** — It is sometimes a question, in proceedings relative to the custody of minors, how far the child's own wishes should be consulted. Where the object is simply that of custody, the rule, though not arbitrary, rests manifestly upon a principle elsewhere often applied; namely, that after a child has attained to years of discretion he may have, in case of controversy, a voice in the selection of his own custodian. The practice is to give the child the right to elect where he will go, if he be of proper age. If he be not of that age, and want of discretion would only expose him to dangers, the court must make an order for placing him in custody of the suitable person.[1]

§ 251. **Contracts transferring Parental Rights.** — It is held in England that an agreement by which the father surrenders custody of his child is not binding; and that he is at liberty to revoke his consent afterwards, and obtain the child by a writ of *habeas corpus*.[2] The policy of the rule is otherwise in some American States. Thus, there is a Massachusetts case where a child had been given up at its birth, the mother having then died, to its grandparents, who kept it for thirteen years, at their own expense, without any demand made by the father for its restoration; and under these circumstances the court refused afterwards to change the custody.[3] The general doctrine appears to us, on the whole, to be this:

extent deprived of its discretion in disposing of the custody of children whose parents are separated, but not divorced; for by this statute the custody of the children under seven years of age is transferred from the father to the mother. Bennet *v* Bennet, 2 Beasl. 114. As to modifying the order of custody after divorce, see Harvey *v.* Lane, 66 Me. 536.

[1] Forsyth Custody, 93, &c.; Rex *v.* Greenhill, 4 Ad. & El. 624. Nine or ten years of age has been considered too young; yet mental capacity appears the real test; and the wishes of children less than fourteen have been regarded. See Anon, 2 Ves. 274; *Ex parte* Hopkins, 2 P. Wms. 152; Curtis *v.* Curtis, 5 Gray, 535; People *v.* Mercein, 8 Paige, 47; *In re* Goodenough, 19 Wis. 274; Regina *v.* Clarke, 7 El. & B. 186; State *v.* Richardson, 40 N. H. 272; Spears *v.* Snell, 74 N. C 210. But according to Regina *v.* Howes, 3 Ell. & El. 332, and Mallinson *v.* Mallinson, L. R. 1 P. & D. 221, sixteen years is now the limit adopted in English courts within which the child's own choice as to custody may be regarded. See, as to children too young, Rust *v.* Vanvacter, 9 W. Va. 600; Henson *v.* Walts, 40 Ind. 170.

[2] Regina *v.* Smith, 16 E. L. & Eq. 221.

[3] Pool *v.* Gott, 14 L. R. 269, before Shaw, C. J. And see *In re* Goodenough, 19 Wis. 274, Bently *v.* Terry, 59 Ga. 555.

that public policy is against the permanent transfer of the natural rights of a parent; and that such contracts are not to be specifically enforced, unless in the admitted exception of master and apprentice, to constitute which relation requires, both in England and America, certain formalities; and excepting, too, in parts of the United States where the principles of legal adoption are part of the public policy.[1] American courts hold fast, nevertheless, to the true interests and welfare of the child. And hence the contract of a parent unfit to have custody of the child, which surrenders that child, by formal instrument, fair in its terms, to a benevolent institution, for the purpose of having the child brought up in a good family, or to some other suitable third party, has been so far upheld, where the institution or person entrusted has not failed in duty, that the child is suffered to remain where he was placed, for the reason that his welfare requires it, rather than be returned to the parent who seeks to recover custody once more.[2] And so too, often where a shiftless parent permits the child to be brought up by other relatives at their cost, and a change afterwards would be unsuitable.[3]

Nor can the father, under the common-law rule, divest himself, even by contract with the mother, of the custody of his children, though he allows them to remain with her

[1] See, as to adoption, *supra*, § 232.

[2] 2 Kent Com. 205; State *v.* Barrett, 45 N. H. 15; Dumain *v.* Gwynne, 10 Allen, 270; Commonwealth *v.* St. John's Asylum, 9 Phila. 571.

The mother, being a suitable person, was allowed to recover custody, in Wishard *v.* Medaris, 34 Ind. 168. And see Beller *v.* Jones, 22 Ark. 92. Mayne *v.* Baldwin, 1 Halst. Ch. 454; People *v.* Mercein, 8 Paige Ch. 67; s. c. 3 Hill, 408; State *v.* Libbey, 44 N. H. 321; State *v.* Scott, 30 N. H. 274, establish that a parol transfer of custody is insufficient. But this is rather as regards the parent, than third parties or the heirs or kindred of the parent. Assent and transfer was, after long lapse of time, presumed in Sword *v.* Keith, 31 Mich. 248. And a grandparent, by virtue of transfer to him, may sue a third person for disturbing his custody, in Clark *v.* Bayer, 32 Ohio St. 299.

[3] Drumb *v.* Keen, 47 Iowa, 435.

If a father, after making an assignment of the services or society of his minor child, has retaken the child into his own keeping, the assignee's only remedy on his own behalf (if any he have) is by action on the contract. Farnsworth *v.* Richardson, 35 Me. 267. And see Commonwealth *v.* M'Keagy, 1 Ashm. 248; Lowry *v.* Button, Wright, 330. An adjudication of the appropriate tribunal on the question of the custody of an infant child, brought up on *habeas corpus*, may be pleaded as *res adjudicata*. Mercein *v.* People, 25 Wend. 64.

for several years.[1] Yet the rule in some States is more flexible.[2]

§ 252. **Right of Parent to Child's Labor and Services.** — Next to the right of custody of infants comes that of the value of their labor and services. The father, says Blackstone, has the benefit of his children's labor while they live with him and are maintained by him; and this is no more than he is entitled to from his apprentices or servants.[3] This right, like that of custody, rests upon the parental duty of maintenance, and furnishes some compensation to the father for his own services rendered the child.

Whether this right remains absolute in the father until the child has attained full age is apparently a matter of doubt. It is certainly perfect while the period of the child's nurture continues. But if this is all, it can be of little consequence, because the child's labor and services are for that period of little or no value; nor could compensation be thus afforded for the many years when the child was entirely helpless. All will admit that the father's right continues until the child reaches fourteen. And since the father's guardianship by nature extends through the full term of the child's minority; since, too, he may by will place a testamentary guardian of his own choice over the infant; since it is reasonable that the law should set off years of later usefulness against years of earlier helplessness; in short, since the age of majority is fixed as the period when an infant becomes legally emancipated from his father's control; we may fairly assume that, all other things being equal, the father is actually entitled to the value of his child's labor and services until the latter becomes of age. This is the principle assumed by the elementary writers,[4] and in most of the judicial decisions;[5]

[1] Torrington *v.* Norwich, 21 Conn. 543; People *v.* Mercein, 3 Hill, 408. And see Vansittart *v.* Vansittart, 4 Kay & J. 62; Johnson *v.* Terry, 34 Conn. 259.

[2] Wodell *v.* Coggeshall, 2 Met. 89. And see State *v.* Smith, 6 Me. 402.

As to custody in matters of guardianship, see *infra*, Part IV.

[3] 1 Bl. Com. 453; 2 Kent Com. 193.

[4] 1 Bl. Com. 453; Reeve Dom. Rel. 290.

[5] Day *v.* Everett, 7 Mass. 145; Benson *v.* Remington, 2 Mass. 113; Plummer *v.* Webb, 4 Mason, 380; Gale *v.* Parrot, 1 N. H. 28; Nightingale *v.* Withington, 15 Mass. 272; The Etna, Ware, 462.

though to such opinion Chancellor Kent appears to yield a somewhat doubtful assent.[1]

The right of action to recover for the services of a minor is then presumed to be in his father.[2] And the father may charge services rendered by his son, as a master for his apprentice or hired laborer, and consider it his own work.[3] The right to sue for services *quantum meruit* is likewise *prima facie* in the father.[4] We assume that the child lives at home or is supported by the parent. And if a child, being of full age, chooses to remain with the father, or is imbecile and needs to be harbored at home, the relation may continue so as to entitle the parent, either as such or on the principle of master and servant, to recover for the child's wages in the same manner.[5]

§ 252 *a*. **The Same Subject.** — But the duties and rights of parents are limited, mutually dependent, and in a great degree correspondent with one another. When the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, our courts are reluctant to admit his right to the child's services. Under such circumstances, says a New Hampshire court, "there is no principle but that of slavery which continues his right to receive the earnings of his child's labor."[6] Of the emancipation of children, thus or otherwise secured, we shall speak hereafter.[7]

The parent may voluntarily relinquish the right to his child's earnings, and may permit the child to earn for himself, receive his earnings, and appropriate them at pleasure. He is not obliged to claim such earnings for the benefit of his own creditors.[8] And if the parent authorize a third person

[1] 2 Kent Com. 193.

[2] Dufield *v.* Cross, 12 Ill. 397; Shute *v.* Dorr, 5 Wend. 204; Hollingsworth *v.* Swedenborg, 49 Ind. 378; Monaghan *v.* School District, 38 Wis. 100. See Campbell *v.* Cooper, 34 N. H. 49.

[3] Brown *v.* Ramsay, 5 Dutch. 117. But see Jones *v.* Buckley, 19 Ala. 604.

[4] Letts *v.* Brooks, Hill & Den. 36; Van Dorn *v.* Young, 13 Barb. 286.

[5] Brown *v.* Ramsay, 5 Dutch. 117; Overseers of Alexandria *v.* Overseers of Bethlehem, 1 Harr. 122; *infra*, c. 5.

[6] Woods, J., in Jenness *v.* Emerson, 15 N. H. 489. But in this case the principle seems to be assumed that the parent's obligation to support and his right to receive wages commence together, continue together, and ought always to terminate together.

[7] See *infra*, c. 5.

[8] Even if the father is insolvent, he

to employ and pay the child, payment to the child and not to the parent will be a sufficient discharge. Such an agreement may be in express terms, or it may be implied from circumstances.[1] An American court favorably regards contracts of this nature, for the child's benefit, as they are in conformity with the spirit of free institutions.[2] And a New York statute provides that unless the parent notifies the minor's employer, within thirty days after the commencement of service, that he claims the wages, payment to the minor will be good.[3] When the parent is a pauper and is maintained by a town, such town is held not entitled to the earnings of a minor child who is not himself a pauper.[4] The father may by his own delay forfeit the right of action for his son's wages; as where the minor agrees to work at certain monthly wages to be paid to himself, and the father, knowing of the agreement, gives no notice of his objection, but waits until the work has been done and payment is made to the child, before making a demand.[5] But if the father has given seasonable notice of his dissent and demand to the stranger hiring his son, the fact that the son continues to work against his express dissent, and that the stranger notified him to come and take his son away and he neglected to do so, will not preclude him from recovering the wages.[6] Nor does the fact that the son has agreed with his father to buy out his time for the remainder of his minority by paying a certain sum therefor, which has not been paid, prevent the father from recovering his wages pending the payment of such sum.[7]

may thus relinquish, provided this be done in good faith. Wilson *v.* McMillan, 62 Ga. 16; Atwood *v.* Holcomb, 39 Conn. 270; Wambold *v.* Vick, 50 Wis. 456. But the executory promise to relinquish is revocable. Stovall *v.* Johnson, 17 Ala. 14.

[1] See Campbell *v.* Cooper, 34 N. H. 49; Jenness *v.* Emerson, 15 N. H. 489; Cloud *v.* Hamilton, 11 Humph. 104; Armstrong *v.* McDonald, 10 Barb. 300.

[2] Snediker *v.* Everingham, 3 Dutch. 143; Cloud *v.* Hamilton, 11 Humph. 104. An infant may sue for breach of contract for employment, even though the father might also sue; relinquishment of the latter's right being implied from circumstances. Benziger *v.* Miller, 50 Ala. 206. See *post*, c. 5.

[3] N. Y. Laws, 1850, p. 579; Herrick *v.* Fritcher, 47 Barb. 589. And see Everett *v.* Sherfey, 1 Iowa, 356.

[4] Jenness *v.* Emerson, 15 N. H. 486.

[5] Smith *v.* Smith, 30 Conn. 111.

[6] *Ib.*

[7] Cahill *v.* Patterson, 30 Vt. 592. And see Kauffelt *v.* Moderwell, 21 Penn. St. 222; Cloud *v.* Hamilton, 11

We may add that whatever private arrangement may exist between the father and his son, unless it is brought to the employer's notice it cannot be set up to justify payment to the minor himself. As for instance, where father and son had secretly agreed that the latter should have his own wages.[1] And the publication, by a parent, of a notice of his son's emancipation, more liberal to the latter than the actual agreement between them, will not, as against one who has no knowledge of the publication, estop the father from insisting on such right to his son's wages as the contract between them actually gives.[2] But the usage of father and son may be alleged.[3]

One who employs the minor son of another cannot be liable to his father as for breach of contract, because of such minor's delinquencies. Hence, it is held, that where the father contracts that his minor son shall work for a specified time and price, and the son leaves his employer before the expiration of the time, against his father's will, the father can only recover for the time of actual employment, although the employer assented to the departure.[4] But where the minor is hired to serve for a specified time, the employer who contracted with the parent should notify the latter of any failure of duty on the child's part before discharging the child, nor should he discharge without notice to the parent.[5] If a father place his minor son to work for another, for no illegal purpose, and without knowledge and assent as to his illegal employment in fact, he is still entitled to compensation for his son's services. As where a son is employed by another in unlawfully selling intoxicating liquors, the father being ignorant of the nature and character of the services while they were being performed.[6]

Humph. 104; Whiting *v.* Earle, 3 Pick. 201.

[1] Kauffelt *v.* Moderwell, 21 Penn. St. 222.

[2] Mason *v.* Hutchins, 32 Vt. 780.

[3] Perlinau *v.* Phelps, 25 Vt. 478; Canovar *v.* Cooper, 3 Barb. 115.

[4] Hennessy *v.* Stewart, 31 Vt. 486. See Schoenberg *v.* Voight, 36 Mich. 310, where, the employment being *quantum meruit*, the employer could show that the son had embezzled more than his services were worth. But cf. The Lucy Anne, 3 Ware, 253.

[5] Day *v.* Oglesby, 53 Ga. 646.

[6] Emery *v.* Kempton, 2 Gray, 257.

Wages due a minor seaman belong to his father, and the latter may sue for them in admiralty.[1] And payment of such wages to the son, while he was known by his employer to have been less than twenty-one at the time of making the contract, furnishes no defence to an action by the father, who had no knowledge of his hiring until after the wages were earned.[2] Nor is the father, in such case, affected by the terms of the shipping articles, because it is an express contract which, as against him, the son has no right to make; he can claim under a *quantum meruit* for the value of the services. But mercantile custom may determine certain questions as to the remedy.[3] As to enlistments in the army or navy of the United States, the laws contemplate that the contract is personal and for the benefit of the infant; and pay, bounties, and prize-money in general, though earned under State laws, are held to belong to the son, and not to the father.[4]

§ 253. **Clothing, Money, &c., given to the Child; Right to Insure.** — Where a father furnishes his minor child with clothing, such clothing is the property of the father, and he may maintain an action for the loss and injury thereof; but where he intrusts the child with a sum of money for general purposes, without specific directions as to its appropriation, and the child buys clothing with it, such clothing is not the property of the father.[5] The parent may give articles by parol to his child, and afterwards resume them, there being no consideration.[6] If a young child makes foolish and unnecessary outlay, the parent may repudiate the transaction.[7]

[1] Gifford *v.* Kollock, 3 Ware, 45. As to the effec of desertion by the child after attaining majority, see Cuffin *v.* Shaw, 3 Ware, 82.

[2] White *v.* Henry, 24 Me. 531. See Weeks *v.* Holmes, 12 Cush. 215.

[3] Bishop *v.* Shepherd, 23 Pick. 492.

[4] United States *v.* Bainbridge, 1 Mason, 84; Baker *v.* Baker, 41 Vt. 55; Banks *v.* Conant, 14 Allen, 497; Mears *v.* Bickford, 55 Me. 528; Carson *v.* Watts, 3 Doug. 350; Cadwell *v.* Sherman, 45 Ill. 348; Magee *v.* Magee, 65 Ill. 255. But cf. Ginn *v.* Ginn, 38 Ind. 526.

[5] Dickinson *v.* Winchester, 4 Cush. 114; Parmelee *v.* Smith, 21 Ill. 620; Prentice *v.* Decker, 49 Barb. 21.

[6] Cranz *v.* Kroger, 22 Ill. 74; Stovall *v.* Johnson, 17 Ala. 14.

[7] See Sequin *v.* Peterson, 45 Vt. 255, and cases cited. Here the child, eleven years old, having bought cigar-holders, pipes, &c., of a shopkeeper, the father was allowed to recover the money in his own name, upon promptly repudiating the contract and making his demand. Money entrusted to a minor son for a specific purpose, and applied by him without his father's as-

A father has a pecuniary interest in the life of a minor child, and an insurance of the life of such child is not within the rule of law by which wager policies are declared void.[1]

§ 254. **Mother's Rights to Child's Services and Earnings.** — At the common law a mother has no implied right to the services and earnings of her minor child; not being bound for the child's maintenance. Nor have her rights or liabilities in these respects been usually regarded as equivalent to those of a father, even where she is the only surviving parent.[2] But the modern tendency in this country, if not in England, is certainly to treat a mother's rights with considerable favor, especially if she be a widow; and in several late cases her title has been upheld in her minor child's clothing[3] or earnings, so far as concerns third persons; it appearing that she was the surviving parent, and that the child had no probate guardian and was not emancipated. Whether such title on her part could be so well enforced against the child's own consent, and to the extent of depriving the child of the fruits of his own toil, especially if she remarries, may be reasonably doubted.[4]

§ 255. **Parent has no Right to Child's General Property.** — As a rule, the parent has no rights over the child's general property. The law treats legacies, gifts, distributive shares, and the like, which may vest in a person during minority, as his own property; and the modern practice is to require the appointment of a guardian in such cases, to manage the estate until the child comes of age.[5] Under no pretext may the

sent in compounding his own crime, may be recovered by the father from the receiver upon a similar principle. Burnham *v.* Holt, 14 N. H. 367. *Aliter*, if the father assented to the payment, or if the money was paid solely as civil damages in settlement of a trespass. *Ib.*

[1] Mitchell *v.* Union, &c. Ins. Co., 45 Me. 104. But see Worthington *v.* Curtis, 1 Ch. D. 419.

[2] 1 Bl. Com. 453; Commonwealth *v.* Murray, 4 Binn. 487; Riley *v.* Jameson, 3 N. H. 29; People *v.* Mercein, 3 Hill, 400; Morris *v.* Low, 4 Stew. & Port. 123; Pray *v.* Gorham, 31 Me. 240; Snediker *v.* Everingham, 3 Dutch. 143. See Clapp *v.* Greene, 10 Met. 439; Campbell *v.* Campbell, 3 Stockt. 268.

[3] Burke *v.* Louisville R., 7 Heisk. 451.

[4] See Matthewson *v.* Perry, 37 Conn. 435; Hammond *v.* Corbett, 50 N. H. 501; Hays *v.* Seward, 24 Ind. 352; Hollingsworth *v.* Swedenborg, 49 Ind. 378; Lind *v.* Sullestadt, 21 Hun, 364.

[5] Keeler *v.* Fassett, 21 Vt. 539; Jackson *v.* Combs, 7 Cow. 36; Miles *v.* Boyden, 3 Pick. 213; Cowell *v.* Daggett, 97

father appropriate such funds to himself, or use them to pay his own debts; and an administrator or trustee who pays the child's money to the father as parent incurs a personal risk.[1] The same may be said of the child's lands.[2] And the parent's investment of his child's money for the latter's benefit will be protected against all creditors of the former, who are chargeable with notice of the child's rights.[3]

§ 256. **Constitutional Right of Legislature to interfere with Parent.** — The rights of parents in relation to the custody and services of their children may be enlarged, restrained, and limited, as wisdom or policy may dictate, unless the legislative power is limited by some constitutional prohibition.[4] But it is held that the State has no constitutional right to interfere with the parent and take charge of a child's education and custody, on the mere allegation that he is "destitute of proper parental care, and is growing up in mendicancy, ignorance, idleness, and vice."[5]

CHAPTER IV.

THE PARENT'S RIGHTS AND LIABILITIES FOR THE CHILD'S INJURIES AND FRAUDS.

§ 257. **Injuries, &c., committed upon or by the Child.** — Two distinct topics are to receive treatment in the present chapter,

Mass. 434; Kenningham *v.* M'Laughlin, 3 Monr. 30. And see Guardian and Ward, *infra*. But see Selden's Appeal, 31 Conn. 548. A father who buys property for himself in his son's name must not perpetrate a fraud upon others. Richardson's Case, L. R. 19 Eq. 588.

[1] Perry *v.* Carmichael, 95 Ill. 519; Clark *v.* Smith, 13 S. C. 585.

[2] As to conveying an easement, see Farmer *v.* McDonald, 59 Ga. 509. A father, as such, cannot be judicially empowered to sell his son's land. Guynn *v.* McCauley, 32 Ark. 97.

[3] McLaurie *v.* Partlow, 53 Ill. 340. But as to payments of income by the debtor to the natural guardian, which income is applied to the child's necessary use, see Southwestern R. *v.* Chapman, 46 Ga. 557.

[4] United States *v.* Bainbridge, 1 Mason, 71, per Story, J.; Bennet *v.* Bennet, 2 Beasl. 114; State *v.* Clottu, 33 Ind. 409.

[5] People *v.* Turner, 55 Ill. 280. "Sunday laws" of Vermont do not prevent a father from journeying to see his children, who are properly absent from home. McCrary *v.* Lowell, 44 Vt. 116.

under the head of the parent's rights and liabilities for the child's injuries and frauds. *First*, the parent's right of action where his child is the injured party. *Second*, the parent's liability to action where his child is the injuring party.

§ 258. **Injuries committed upon the Child; Parent's Right to Sue.** — *First.* Where a child suffers wrong, he has his action for the personal injury.[1] But besides this the parent may usually claim indemnity for loss of his child's services, to which should be added the incidental expenses incurred in consequence of the injury. Hence arises a cause of action in the parent *per quod*, the foundation of which is a loss of the child's services. There are various tortious acts, by which a parent may be deprived of his child's services; and the law is generous in securing compensation for the injury.

But in this connection the parental relation is not strictly to be considered; the rule being that a parent has no remedy for an injury done to his child by the wrongful act of another, unless that child can be treated in law as his servant.[2]

This is laid down positively as the English rule. Thus, in a case where the plaintiff brought an action against the defendant for carelessly driving over and injuring the plaintiff's child, so that the plaintiff was obliged to expend a large sum of money in doctors and nurses, and it appeared that the child was only two years and a half old, and incapable of performing any act of service, it was held that the parent's action was not maintainable.[3] "The gist of the action," it is here said, "is the loss of services, and therefore, though the relation of parent and child subsists, yet, if the child is incapable of performing any services, the foundation of the action fails."[4] And it is doubtful whether the father, as such, can even maintain a special action for the expenses

[1] See *post*, Part V. c. 4. The fact that a child, by her father as next friend, has recovered damages for a personal injury, does not bar the father's subsequent action for loss of services from the same injury. Wilton *v.* Middlesex R., 125 Mass. 130. Here the child reached majority before the father sued.

[2] 2 Hilliard Torts, 518–529; Addison Torts, 697; Grinnell *v.* Wells, 7 M. & Gr. 1041; Rogers *v.* Smith, 17 Ind. 323; Hartfield *v.* Roper, 21 Wend. 615; Dennis *v.* Clark, 2 Cush. 347. And see Bigelow on Torts.

[3] Hall *v.* Hollander, 7 Dowl. & Ry. 133; 4 Barn. & Cress. 660.

[4] Bayley, J., in *ib.*

necessarily incurred by him in having so young a child cured of the injury.[1]

In this country, the rule appears to be more liberal towards the parent. A New York court observes that it is really questionable whether the father can be deprived of his right to sue for the loss of services, on account of the child's youth; though, of course, the right may be forfeited by the parent's culpable negligence.[2] And in Massachusetts it is decided that if an infant child, a member of his father's household, and too young to be capable of rendering any service to his father, is wounded or otherwise injured by a third person, or by a mischievous animal owned by a third person, under such circumstances as to give the child himself an action against such person for the personal injury, and the father is thereby necessarily put to trouble and expense in the care and cure of the child, he may maintain an action against such person for indemnity. The court laid down the rule, however, with much caution.[3]

§ 259. **Same Subject.** — Statutes enlarging the rights of widows, dependent parents, and others, in torts occasioned by the negligence of railroad corporations and other common carriers, are to be found in England and America. Under such statutes it is frequently provided that, where a child is thus killed, the child's administrator may sue for the parent's benefit. The English statute, known as Lord Campbell's Act, 9 & 10 Vict. c. 93, has given rise to suits of this kind; but the rule is laid down that such actions are not maintainable without some evidence of actual pecuniary damage, some loss of service.[4] Though natural equity may assert otherwise, the common law does not permit a father to re-

[1] See Addison Torts, 697; Grinnell *v.* Wells, 8 Scott N. R. 741. *Contra*, Hall *v.* Hollander, *supra*.

[2] Hartfield *v.* Roper, 21 Wend. 615.

[3] Dennis *v.* Clark, 2 Cush. 347. A parent may recover the expense of nursing and healing his minor child of such tender years that it is incapable of rendering him any service, from one who wilfully or negligently injures such child. Sykes *v.* Lawlor, 49 Cal. 236. Cf. Karr *v.* Parks, 44 Cal. 46; Sawyer *v.* Sauer, 10 Kan. 519.

[4] Duckworth *v.* Johnson, 4 Hurl. & Nor. 653. See further, Frank *v.* New Orleans, &c. R., 20 La. Ann. 25; Pennsylvania R. *v.* Bantom, 54 Penn. St. 495; Gann *v.* Worman, 69 Ind. 458; Perry *v.* Carmichael, 95 Ill. 519.

cover for injuries causing the immediate death of his child, either on the ground of loss of services or for burial expenses.[1] And since, as we have seen, the parent's right of suit is founded upon the loss of a child's services, there are circumstances under which such suits might be brought, notwithstanding the child was of age, contrary to the general rule.[2]

Trespass lies *per quod* for loss of services occasioned by assault and battery of the child.[3] The true question here, as elsewhere, seems to be, whether a loss of service was consequent upon the injury. For assault and battery on the high seas, there is likewise a remedy in admiralty.[4]

If the parent has finally relinquished his right to the services of his child, he cannot claim such damages; they belong to the master, if any one; but this question of relinquishment is for determination on the usual principles.[5] And where an injury is inflicted upon a child while living with and in the service of another, the proper remedy of the father is trespass on the case for the reversion, as it were, of the child's services; as where a person who hired the son of another put him upon a vicious horse, so that he was thrown and had his leg broken.[6] And the parent's negligence may, in certain cases, defeat his own right of action for loss of service altogether, as well as that of the young child for the injury suffered.[7] The death of the child after the injury, though it may, on familiar principles, terminate the right to sue for the child's tort, does not affect the parent's consequential right of action. The death occurring before the commencement of the suit, if in consequence of the injury, only aggra-

[1] Osborn *v.* Gillett, L. R. 8 Ex. 88, and cases cited; Edgar *v.* Castello, 14 S. C. 20; McDowell *v.* Georgia R., 60 Ga. 320; Carey *v.* Berkshire R., 1 Cush. 475.

[2] Pennsylvania R. *v.* Keller, 67 Penn. St. 300; Mercer *v.* Jackson, 54 Ill. 397. And see *infra*, § 262.

[3] Hammer *v.* Pierce, 5 Harring. 171; Hoover *v.* Heim, 7 Watts, 62; Plummer *v.* Webb, Ware, 75; Cowden *v.* Wright, 24 Wend. 429. But as to indictments, see Hearst *v.* Sybert, Cheves, 177.

[4] Plummer *v.* Webb, Ware, 75.

[5] Arnold *v.* Norton, 25 Conn. 92.

[6] Wilt *v.* Vickers, 8 Watts, 227.

[7] See *infra*, Part V. c. 4; Pierce *v.* Millay, 62 Ill. 133; Smith *v.* Hestonville R., 92 Penn. St. 450; Kreis *v.* Wells, 1 E. D. Smith, 74; Glassey *v.* Hestonville, &c. R., 57 Penn. St. 172.

vates the parent's remedy; if the death is occasioned by other causes, it leaves the remedy as it stood before.[1]

§ 260. **Suit for harboring or enticing away One's Child; Abduction, &c.** — Every person who knowingly and designedly interrupts the relation subsisting between parent and child, by procuring the child to depart from the parent's service, or by harboring and keeping him after he has quitted his home, commits a wrongful act, for which he is responsible to the parent. The offence, where force was not used, is known as enticement, and the rule applies to the relation of master and servant. In such cases, again, the parent sues on a principle analogous to that of the master; namely, because of an alleged loss of service; or possibly in trespass *vi et armis* upon the more reasonable allegation of loss of the child's society.[2] And this action will lie on behalf of the mother after the father's death.[3] The *quo animo* of the defendant in such suits is always material. To afford shelter is one thing; to encourage filial disobedience another. The mere employment of a runaway child does not amount to enticement.[4] But where it appears that the defendant, knowing that the son had absconded from his father, boarded him in his family and allowed him to work on his farm as he pleased, doing this with the intention of aiding or encouraging, or with the knowledge that it aids and encourages the son to keep away from the father, he is liable to this action.[5]

[1] Plummer *v.* Webb, Ware, 80; Winsmore *v.* Greenbank, Bull. N. P. 78; Ihl *v.* Street R., 47 N. Y. 317.

[2] Lumley *v.* Gye, 2 El. & B. 224; Kirkpatrick *v.* Lockhart, 2 Brev. 276; 1 Woodes. Lec. 451; Sargent *v.* Mathewson, 38 N. H. 54; 3 Bl. Com. 140.

[3] Jones *v.* Tevis, 4 Litt. 25; Moore *v.* Christian, 56 Miss. 408.

[4] Keane *v.* Boycott, 2 H. Bl. 511; Butterfield *v.* Ashley, 6 Cush. 249.

[5] Sargent *v.* Mathewson, 38 N. H. 54; Everett *v.* Sherfey, 1 Iowa, 356. Indictment lies under fit circumstances for the offence of abduction or enticement of one's minor child. See Langham *v.* State, 55 Ala. 114; State *v.* Rice, 76 N. C. 194; Queen *v.* Prince, L. R. 2 C. C. 154. The doctrine of enticement extends to the relation of Master & Servant, where it will be considered further. See *post*, Part VI., c. 4; Noice *v.* Brown, 39 N. J. L. 569; Morgan *v.* Smith, 77 N. C. 37. Where one's minor child is enticed away or harbored against the father's will, and without justification, the offender cannot, of course, recover for the child's board. Schnuckle *v.* Bierman, 89 Ill. 454. But where one employs a runaway child *bona fide*, without being guilty of this offence, he may offset wages due the father by the expense of actual support of the child. Huntoon

A parent may maintain a libel in the admiralty for the wrongful abduction of his child, a minor, and carrying him beyond the seas.[1] Abduction or kidnapping is an offence similar to enticement, but implying the use of force rather than persuasion; and the parental remedies are similar. Where father and mother live apart, the mother's assent to the child's enlistment as a sailor may sometimes affect the father's remedies.[2] But some parental ratification of the son's contract of enlistment should be shown, in order to defeat the parent's right of action; and similar principles apply in the case of an army enlistment; there being, doubtless, cases where a parent may sue one at law for unlawfully harboring and concealing his young child, and so inducing him to enlist as a soldier.[3]

There must be a reasonable limit to suits by the parent for loss of his child's society and services. Hence it is now well settled in this country that the parent cannot sue for enticing his child into a marriage against the parent's consent.[4] For a forcible abduction, resulting in an imperfect marriage, and aggravated cases of a like nature, where, in fact, there is not a valid union, there might be a remedy. So the marriage statutes not unfrequently provide penalties to be meted out to offenders who aid and encourage infants in evading statutes requiring the consent of parents or guardians. But for drawing children of suitable age into a marriage which pleases themselves, the law affords no redress; nor can it punish for the sake of parental discipline. And even though the match be unhappy, yet marriage must supersede the filial relation.[5] Nor can a parent sue a school teacher, school

v. Hazelton, 20 N. H. 388. The father may sue on the basis of a contract for his absconding child's wages; but he is put to his election, and the suit in tort against the employer, for unlawfully enticing or harboring his minor child, precludes the action of assumpsit as for wages earned. Thompson *v.* Howard, 31 Mich. 309; Grand Rapids R. *v.* Showers, 71 Ind. 451.

[1] Steele *v.* Thacher, Ware, 91; Plummer *v.* Webb, 4 Mason, 380. See Cutting *v.* Seabury, Sprague, 522; Weeks *v.* Holmes, 12 Cush. 215.

[2] Wodell *v.* Coggeshall, 2 Met. 89. And see Worcester *v.* Marchant, 14 Pick. 510.

[3] Caughey *v.* Smith, 47 N. Y. 244.

[4] Jones *v.* Tevis, 4 Litt. 25; Hervey *v.* Moseley, 7 Gray, 479; Goodwin *v.* Thompson, 2 Greene (Iowa), 329. But see Hills *v.* Hobert, 2 Root, 48.

[5] Marrying a parent's son and heir was a civil injury at common law du-

trustees, or others, for excluding his children from school; the right of action, if any, being in the child;[1] and there being no real loss of services consequent upon the affront. In short, the general rule is to place all actions by the parent on the sole ground of value of the lost services of the child, who is regarded as a servant for the purpose of the suit; not to punish, for the sake of the father, those who wrong the child.[2] And the most liberal view of the subject indicated by American courts is to regard the parent as in a measure entitled to the society and solace of his own children; though this reasonable position is not clearly supported by authority.

§ 261. **Suits for Seduction of a Child.** — Even in seduction suits the same technical principle is rather absurdly, though not always unkindly, applied. The foundation of the action by a father to recover damages against the wrong-doer for the seduction of his daughter has been uniformly placed, from the earliest times, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which he is supposed to have a legal right or interest.[3] At common law the seduced woman herself has no cause of action against her seducer.[4] And without some allegation and proof of loss of service in a parent or master the action is not maintainable.

Thus, where it was alleged by the father that his daughter was a poor person, maintaining herself by her labor and personal services, and not of sufficient ability to maintain herself otherwise; and that, by being debauched, she became unable

ring the continuance of the military tenures, for thereby the parent lost the value of his child's marriage; but this injury ceased long ago, with the right on which it was founded. See 3 Bl. Com. 140, and notes.

[1] Spear *v.* Cummings, 23 Pick. 224; Donahoe *v.* Richards, 38 Me. 376; Boyd *v.* Blaisdell, 15 Ind. 73; Stephenson *v.* Hall, 14 Barb. 222. *Contra*, Roe *v.* Deming, 21 Ohio St. 666.

[2] Hall *v.* Hollander, 4 B. & C. 660; Grinnell *v.* Wells, 7 M. & Gr. 1033; Eager *v.* Grimwood, 1 Exch. 61. But see *dictum* in Stephenson *v.* Hall, 14 Barb. 222.

[3] Grinnell *v.* Wells, 7 M. & Gr. 1033; Eager *v.* Grimwood, 1 Exch. 61; Van Horn *v.* Freeman, 1 Halst. 322; McDaniel *v.* Edward, 7 Ired. 408; Sutton *v.* Huffman, 32 N. J. L. 58; Knight *v.* Wilcox, 14 N. Y. 413; Bartley *v.* Richtmeyer, 4 Comst. 38.

[4] Woodward *v.* Anderson, 9 Bush, 624. Some statutes change this rule and favor direct suits for seduction. Thompson *v.* Young, 51 Ind. 599.

to work, and had to be maintained by her father at considerable expense — all this was held insufficient allegation of loss of service.[1] So it is not enough to show that the father had apprenticed his daughter to the defendant to learn millinery, and had paid him a large sum of money to instruct her in a trade, but that the defendant seduced her and rendered her unable, by reason of pregnancy, to learn the trade.[2] But the evidence of service may be very slight; for the making tea, milking cows, or doing any household work at the command of the parent, is esteemed quite sufficient to constitute the relationship of master and servant, when the girl is residing with her father and mother;[3] and the right of action once clear, damages far in excess of the loss of service are recoverable. Thus will justice, seeing the goal clearly, drive straight towards it, regardless of obstructions; either finding an avenue or making one.

But to render this action maintainable, the parent must have a genuine right to his daughter's services; however slight the services which may be exacted. If therefore the daughter, at the time she was seduced, was at the head of an establishment of her own, and her father was living with her as a visitor in her own house, she cannot be treated as holding the subordinate position of a servant, and the action will not lie.[4] Nor can a parent sue, as the stricter rule is laid down, where the child is really in the service of another, and, by permission of her mistress, comes home to render slight assistance from time to time.[5] Nor where the child is seduced while in the service of another, and then returns home and remains there in a state of pregnancy.[6] But if she is away only on a temporary visit, and still forms part of her father's family, and makes herself serviceable to him while she is at home, such temporary absence constitutes no impedi-

[1] Grinnell *v.* Wells, 7 M. & Gr. 1033.

[2] Harris *v.* Butler, 2 M. & W. 539.

[3] 1 Addison Torts, 698, 701; Bennett *v.* Allcott, 2 T. R. 166; Thompson *v.* Ross, 5 Hurl. & Nor. 16; Manvell *v.* Thomson, 2 Car. & P. 303; Vossel *v.* Cole, 10 Mo. 634; 2 Kent Com. 205, 12th ed., and cases cited.

[4] Manley *v.* Field, 7 C. B. N. S. 96.

[5] Thompson *v.* Ross, 5 Hurl. & Nor. 16; Hedges *v.* Tagg, L. R. 7 Ex. 283; Blaymire *v.* Haley, 6 M. & W. 55.

[6] Davies *v.* Williams, 10 Q. B. 725.

ment to an action by the father for damages.[1] In a word, the question is whether there was, at the time the injury was committed, a *bona fide* relation of constructive service between parent and child, which suffered by the wrongful act of the defendant.

This rule of constructive service is, however, carried very far. There is a late New Jersey case, where it appeared in evidence that the daughter was about twenty-two years of age when seduced, and was living a part of the time with her brother, who occupied a farm about a mile from her father, and part of the time with her father. While the rule was fully approved that the father and daughter must have stood in the relation of master and servant at the time the injury was committed, it was further held that it was not necessary that the daughter should be in the *actual service* of the father at the time of the seduction, if the relation of master and servant then existed between them; in other words, that the service rendered need not be house service, nor service from day to day, but that any accustomed service lost by the injury would sustain the action.[2] So in a recent English case the plaintiff's daughter, being under age, left his house and went into service. After nearly a month the master dismissed her at a day's notice, and the next day, on her way to her father's house, the defendant seduced her. It was held that as soon as the real service was terminated by the master, whether rightfully or wrongfully, the girl intending to return home, the right of the father to her services revived, and that there was, therefore, sufficient evidence of

[1] Griffiths *v.* Teetgen, 15 C. B. 344; 28 E. L. & Eq. 371. See further, 1 Addison Torts, 698; Evans *v.* Walton, L. R. 2 C. P. 615.

[2] Sutton *v.* Huffman, 32 N. J. L. 58. And see Greenwood *v.* Greenwood, 28 Md. 370; Ellington *v.* Ellington, 47 Miss. 329; Emery *v.* Gowen, 4 Me. 33. In these and some other cases there is a manifest tendency to exclude a presumption of emancipation, so as to leave the parent's remedy unimpaired. The rule in Virginia is more strict. Lee *v.* Hodges, 13 Gratt. 726. In New York, the doctrine of Martin *v.* Payne, 9 Johns. 387, and other cases, led to much confusion, by permitting suits to be brought where there was in reality no loss of service sustained. But in the later cases the courts have returned to the strictness of the English rule. Bartley *v.* Richtmeyer, 4 Comst. 38. And cf. earlier and later notes to 2 Kent Com. 205.

service to maintain an action for the seduction.[1] This, the court admitted, was carrying the doctrine of constructive service very far. "The action, no doubt, is founded on the special ground of loss of service (this is not very creditable, perhaps, to our law), but the action is substantially for the aggravated injury that the father has sustained in the seduction of the child."[2] These cases illustrate the generous disposition with which the courts uphold a parent's right of action in seduction suits; and it is here probably that the bounds should be placed to this rule of a daughter's service entitling the parent to sue for damages.[3]

It is not necessary that the daughter should be under age in order that the parent may maintain the action for seduction. The important question is, whether emancipation in fact had taken place at the time of the injury; for if the relation of master and servant exists between the father and his grown-up daughter, however this relation may have been created, the right of action is complete.[4] And even where a married woman, separated from her husband, returned to her father's house and lived with him, performing various acts of service, it was held that, as against a wrong-doer, it was suffi-

[1] Terry *v.* Hutchinson, L. R. 3 Q. B. 599 (1868). And see Evans *v.* Walton, L. R. 2 C. P. 615.

[2] Per Cockburn, C. J., in Terry *v.* Hutchinson, L. R. 3 Q. B. 599.

[3] Where the father verbally agrees that his daughter shall reside as servant in a stranger's family for a certain number of years, this does not debar his right to recover for her seduction during her minority by her employer's son. Mohry *v.* Hoffman, 86 Penn. St. 358. Cf. White *v.* Murtland, 71 Ill. 252.

In other words, the father may sue *per quod* where he does not relinquish the daughter's services, but retains the right to command them, though she resides elsewhere. Mohry *v.* Hoffman, *supra;* Blagge *v.* Ilsley, 127 Mass. 191.

Very slight service at home every Sunday, where the daughter is employed by another, suffices. Kennedy *v.* Shea, 110 Mass. 147.

Enticing one's daughter away for the purpose of prostitution, or concubinage, or seduction, is made an indictable offence in some States. Slocum *v.* People, 90 Ill. 274; State *v.* Breice, 27 Conn. 319; Wood *v.* State, 48 Ga. 192; Boyce *v.* People, 55 N. Y. 644; Bowers *v.* State, 29 Ohio St. 542; Galvin *v.* Crouch, 65 Ind. 56. And see Bishop and other general writers on Criminal Law and Torts. The female, under such statutes, ought in general to be of good repute for chastity previous to the offence, and unmarried. But statutes differ. See State *v.* Jones, 16 Kan. 608. The woman might have reformed. Illicit intercourse alone does not constitute what is known as seduction. People *v.* Clark, 33 Mich. 112.

[4] 1 Addison Torts, 700; Sutton *v.* Huffman, 3 2 N. J. L. 58; Greenwood *v.* Greenwood, 28 Md. 370; Stevenson *v.* Belknap, 6 Iowa, 97; Wert *v.* Strouse, 38 N. J. L. 184.

cient to prove that there was the relationship of master and servant *de facto*.[1] So where one stands *in loco parentis*, he may recover damages, as an actual parent would; as in the case of an orphan living with a relation, or a friend and benefactor, and rendering such domestic attendance and obedience as is usually rendered by a daughter to her father.[2] But the parent cannot maintain an action for the seduction of a daughter over twenty-one and working out on her own account.[3] And while, as surviving parent, the mother might sue for her daughter's seduction under circumstances showing service rendered her, it is held that a mother cannot maintain an action for the seduction of her daughter while the father was alive, though the illicit offspring was not born until after the father's death.[4]

The wrongful act for which the parent sues must be the natural and direct cause of the injury for which damages are sought, and the damages recoverable its necessary and proximate consequence. To this principle is to be referred a curious case in New York.[5] But mental illness directly resulting from the injury is, of itself, sufficient to support an action for loss of services; and such a suit might be maintainable, notwithstanding seduction was followed neither by pregnancy nor sexual disease.[6]

[1] Harper *v.* Luffkin, 7 B. & C. 387.

[2] 1 Addison Torts, 700; Irwin *v.* Dearman, 11 East, 23; Edmondson *v.* Machell, 2 T. R. 4; Williams *v.* Hutchinson, 3 Comst. 312; Maguinay *v.* Saudek, 5 Sneed, 146; Ball *v.* Bruce, 21 Ill. 161.

[3] George *v.* Van Horn, 9 Barb. 533.

[4] Vossel *v.* Cole, 10 Mo. 634; Gray *v.* Durland, 50 Barb. 100. Statutes enlarging the rights of married women sometimes extend the mother's action. Badgley *v.* Decker, 44 Barb. 577. A widowed mother, whose minor child is actually in her service, has the right of action. Gray *v.* Darland, 51 N. Y. 424.

A mother remarried may have the right to sue. Lampman *v.* Hammond, 3 Thomp. & C. 293. See Hobson *v.* Fullerton, 4 Ill. App. 282; Furman *v.* Van Sise, 56 N. Y. 435.

But not one in whose household a girl stays temporarily without any definite agreement of service. Blanchard *v.* Ilsley, 120 Mass. 487.

A grandfather standing in *loco parentis*, and with due rights and obligations, may thus sue. Certwell *v.* Hoyt, 13 N. Y. Supr. 575.

[5] Knight *v.* Wilcox, 14 N. Y. 413. See Eager *v.* Grimwood, 1 Exch. 61; Boyle *v.* Brandon, 13 M. & W. 738; Reddie *v.* Scoolt, Peake, 240; 1 Addison Torts, 701, as to the various grounds of defence in seduction suits.

[6] Manvell *v.* Thomson, 2 Car. & P. 303; Seager *v.* Sligerland, 2 Caines, 219; Abrahams *v.* Kidney, 104 Mass. 222.

Where a person hires a girl as a servant for the purpose of withdrawing her from her family and seducing her, this is fraud, and the parent's right of action is not thereby forfeited; for in such a case the new relation of master and servant is not *bona fide* created, and the former relation may be held to have continued.[1]

§ 262. **Damages in Parental Suits for Injury to the Child.** — As to the amount of damages, cases of seduction stand on a peculiar footing. The ground of action is the loss of services; yet the rule is well established that neither this nor the medical expenses are all that the parent can recover. Lord Ellenborough, in his day, declared the principle inveterate, and not to be shaken, that, in estimating damages, the jury might go beyond the mere loss of service, and give damages for the distress and anxiety of mind which the parent had sustained in being deprived of the society and comfort of his child.[2] So must the situation in life and circumstances of the parties be taken into consideration.[3] These principles are applied both in England and America.

In other suits, such as for enticement, the measure of damages applied is liberal, though the rule is somewhat conflicting in different States. It is a general principle that where servants are enticed away, or forcibly abducted, the jury may award ample compensation for all the damage resulting from the wrongful act.[4] A parent can recover dam-

[1] Speight *v.* Oliviera, 2 Stark. 435; 2 Kent Com. 205; 1 Addison Torts, 699; Dain *v.* Wyckoff, 18 N. Y. 45.

[2] Irwin *v.* Dearman, 11 East, 23.

[3] Andrews *v.* Askey, 8 Car. & P. 9. "In point of form," observes Lord Eldon, "the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort, as well as the service, of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example." Bedford *v.* M'Kowl, 3 Esp. 120. And see Robinson *v.* Burton, 5 Harring. 335; Klopfer *v.* Bromme, 26 Wis. 372; Pence *v.* Dozier, 7 Bush, 133; Dain *v.* Wyckoff, 18 N. Y. 45; White *v.* Murtland, 71 Ill. 250. See further, on this subject, White *v.* Campbell, 13 Gratt. 573; Sellars *v.* Kinder, 1 Head, 134; 1 Addison Torts, 703; Eager *v.* Grimwood, 1 Exch. 61; Richardson *v.* Fouts, 11 Ind. 466; Reed *v.* Williams, 5 Sneed, 580; Vossel *v.* Cole, 10 Mo. 634; 2 Kent Com. 205, 9th ed. *n.*; Bigelow on Torts.

[4] Gunter *v.* Astor, 4 Moore, 15; 1 Addison Torts, 704; Lumley *v.* Gye, 2 El. & Bl. 216; Magee *v.* Holland, 3 Dutch. 86.

ages for the prospective value of the services of a young child permanently injured or killed by an act of negligence;[1] and a reasonable expectation of pecuniary benefit is favorably considered where the parent is old and infirm.[2] Medical expenses for the care and cure of the child are of course recoverable. And even the expense of the mother's sickness, which was caused, in an extreme case, by the shock to her feelings, has been treated as a proper item of special damage.[3] So, it would seem, are the costs of prosecuting the suit.[4] But the parent cannot recover for lacerated feelings, as well as for other injuries personal to the child, as in seduction suits.[5] But local statutes will sometimes affect the question of damages here as well as the right of action itself.[6]

§ 263. **Parental Liability where the Child is the Injuring Party.** — *Second.* As to the parent's liability to action, where the child is the injuring party. The question is sometimes asked, how far a father is responsible in damages for the torts and frauds of his infant child. We have already seen that the husband's responsibility for his wife's injuries at the common law is founded upon his right, by marriage, to her entire property. Very different is the relation of parent and child, where, it is now plain, the father has little more than the right to claim his child's wages, so far as the infant's property is concerned.[7] Yet some have been misled into the belief that the two cases are entirely analogous; and they

[1] *Supra*, § 259; Drew *v.* Sixth Avenue R. R. Co., 26 N. Y. 49; Ford *v.* Monroe, 20 Wend. 210; Hoover *v.* Heim, 7 Watts, 62; Franklin *v.* Southeastern R. R. Co., 3 Hurl. & Nor. 211. But see Williams *v.* Hutchinson, 3 Comst. 314. For the loss of service for the remainder of the period of minority, a parent may usually recover if such loss necessarily result; while if the injury continue beyond that period the right is usually in the child. Traver *v.* Eighth Avenue R., 4 Abb. App. 422; McDowell *v.* Georgia R., 60 Ga. 320; Houston R. *v.* Miller, 49 Tex. 322.

[2] Duckworth *v.* Johnson, 4 H. & N. 653; Franklin *v.* South Eastern R., 3 H. & N. 211.

[3] Ford *v.* Monroe, 20 Wend. 210.

[4] Wilt *v.* Vickers, 8 Watts, 227.

[5] Penn. R. R. Co. *v.* Kelly, 31 Penn. St. 372; Sawyer *v.* Sauer, 10 Kan. 519; Cowden *v.* Wright, 24 Wend. 429. But see, as to battery of a child, Klingman *v.* Holmes, 54 Mo. 304.

[6] M'Carthy *v.* Guild, 12 Met. 291; Kennard *v.* Burton, 25 Me. 39.

[7] Nor can the parent make the infant child's real estate itself liable, even for a necessary debt of his own creation. Cox *v.* Storts, 14 Bush, 502.

would hold the father liable for his son's wrongful acts, as a husband for the wife's. It is held in Pennsylvania that the father may be sued in trespass for an injury committed by his son, when they ride together in the father's team, and the act is committed in the latter's presence.[1] Whether the principle can be safely carried farther is extremely doubtful. In Missouri, on the other hand, and with better reason, it is decided that a father is not responsible for an assault committed by his infant son, without his sanction; not even though the child was known by him to be of a vicious temper.[2] The same rule, with more caution, has been applied in New York, in a case where it was shown that a minor daughter, in her father's absence, and without his authority or approval, wilfully set his dog, not ordinarily a vicious animal, upon the plaintiff's hog, which was thereby bitten and killed.[3]

For such injuries an infant is answerable at law, out of his own estate; at least, if he is old enough to have known better.[4] But how as to the parent's liability? For that is the present issue. The principles of the Roman law cannot be cited to much advantage, in support of such liability, on the score of agency, or otherwise; since under that system, the child was little better than the slave of his father; and even as to slaves, it was considered at the time of the Institutes that it would be very unjust, when a servant did a wrongful act, to make the master lose anything more than the servant himself.[5] The modern rule of the civil law, in European countries, is to make every person responsible for injuries caused by the act of persons and things under his dominion; but a father incurs no responsibility for the act of

[1] Strohl *v.* Levan, 39 Penn. St. 177. And see Lashbrook *v.* Patten, 1 Duvall, 316.

[2] Baker *v.* Haldeman, 24 Mo. 219; Paul *v.* Hummel, 43 Mo. 119.

[3] Tifft *v.* Tifft, 4 Denio, 175. And see McManus *v.* Crickett, 1 East, 106; Foster *v.* Essex Bank, 17 Mass. 479.

Nor was the father held liable in damages where his son set another's property on fire, in Edwards *v.* Crume, 13 Kan. 348. See also Paulin *v.* Howser, 63 Ill. 312; Chandler *v.* Deaton, 37 Tex. 406. The want of parental knowledge or sanction here appeared.

[4] Campbell *v.* Stakes, 2 Wend. 137; "Infancy," *post.*

[5] Smith's Dict. Greek and Roman Antiq. "Novalis Actio." Inst. lib. 4, tit. 8, by Saunders.

his minor child, if he can prove that he was not able to prevent the act which gives rise to the liability.[1]

On the whole it may be stated as a rule that a father is not liable in damages for the torts of his child, committed without his knowledge, consent, or sanction, and not in the course of his employment of the child.

[1] Civil Code France, art. 1384; Cleaveland *v.* Mayo, 19 La. 414. See Baker *v.* Haldeman, 24 Mo. 219.

This point received some attention in a modern English case, where the father of a young man, about seventeen or eighteen, was sued for trespass and false imprisonment. The plaintiff was property-man at a theatre, of which the defendant was lessee. The young man, minor son of the defendant, acted as his father's treasurer. The plaintiff, in his character of property-man, presented to the treasurer an account, containing some wrongful items of disbursement. The defendant, conceiving this to be an intentional fraud on the part of the plaintiff, dismissed him from his employment. His son thereupon, without consulting the father, indiscreetly caused the plaintiff to be apprehended by a policeman, and taken to the station on a charge of obtaining money by false pretences. The plaintiff went before a magistrate, and was remanded, but was ultimately discharged. After the remand, the son told his father what he had done; the latter did not prohibit him from proceeding in the matter, but said that as the son had begun it, he would not interfere. The court decided that these facts showed neither a previous authority nor subsequent ratification by the father, sufficient to render him liable for his son's conduct, and on that ground dismissed the suit. Moon *v.* Towers, 8 C. B. N. S. 611.

The opinions of the several judges in this case, though expressed by way of *dicta*, exhibit considerable reluctance to hold the father liable, as a trespasser, for his son's torts. Says Willes, J., approved by Byles, J., *ib.*; Williams, J., *dub.*, "The tendency of juries, where persons under age have incurred debts, or committed wrongs, to make their relatives pay, should, in my opinion, be checked by the courts. No man ought, as a general rule, to be responsible for acts not his own." And says the Chief Justice: "Suppose the son had knocked the plaintiff down, and the father had said, 'I think it served him right,' would that be such a ratification of the son's act as to make the father liable as a trespasser?" Per Erle, C. J., *ib.* As to the injuries of a servant, and his master's liability, see "Master and Servant," *infra*.

CHAPTER V.

DUTIES AND RIGHTS OF CHILDREN, WITH REFERENCE TO THEIR PARENTS.

§ 264. **General Duties of Children to Parents.** — "The duties of children to their parents," says Blackstone, "arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after; they who protected the weakness of our infancy are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper ought in return to be supported by that offspring in case they stand in need of assistance."[1] Upon this principle rest whatever duties are enjoined upon children to their parents by positive law. The Athenians compelled children to provide for their father when fallen into poverty.[2] And Kent, enforcing the same precept, cites several other historical precedents less to the purpose.[3]

Perhaps this principle could not have been better expressed than in these words of Blackstone; but it is to be observed that the obligation, as a legal one, is somewhat vague and indefinite, extending little farther than the succor of parents in distress. Gratitude, certainly, is what all parents true to their trust have the right to expect; but whether it is due to those who were negligent and unfaithful to their offspring may admit at this day of much doubt. In other words, honor and reverence are justly awarded according to one's deserts. The child, when full grown, naturally marries and assumes parental liabilities of his own; and in the usual course of things

[1] 1 Bl. Com. 453.
[2] 2 Potter's Antiq. 347-351.
[3] 2 Kent Com. 207.

adults, whether father or son, will prudently provide for their future as well as their present wants. Some have thought it the duty of fathers to leave property to their children at their death, — a principle somewhat at conflict with this right to lean upon their children for their own maintenance. Yet exceptional cases must occur where a father, faithful to his own obligations, is yet left, through misfortune, penniless in his old age; and here the voice of nature bids the children aid, comfort, and relieve. Municipal law quickens the child, and says, "If your parent, however vagabond and worthless, becomes unable to maintain himself, the public shall not relieve him as a pauper; you, his children, being of sufficient means, must assume the burden." We speak not here of the mother, whose moral claims upon her children, if her own husband prove incapable, are much stronger; yet it must be admitted that the municipal law makes no great distinction on her behalf.

§ 265. **Whether Child may be Legally Bound to Support Parent; Statutes.** — Thus may be explained what appears now a well-settled rule at the common law; namely, that there is no legal obligation resting upon a child to support a parent; that, while the parent is bound to supply necessaries to an infant child, an adult child, in the absence of positive statute, or a legal contract on his own part, is not bound to supply necessaries to his aged parent.[1]

But statutes have been enacted, both in England and most parts of the United States, to enforce this imperfect legal obligation, usually to the extent of relieving cities and towns from the support of paupers. Such is the tenor of the English statutes of 43 Eliz. and 5 Geo. I., to which allusion has already been made, which declare in effect that the children, being of sufficient ability, of poor, old, lame, or impotent persons, not able to maintain themselves, must relieve and maintain them.[2] Ingratitude, to use the word in a more general sense, the parent may punish still further, as other statutes

[1] Reeve Dom. Rel. 284; Rex *v.* Munden, 1 Stra. 190; Edwards *v.* Davis, 16 Johns. 281; Lebanon *v.* Griffin, 45 N. H. 558; Stone *v.* Stone, 32 Conn. 142; Becker *v.* Gibson, 70 Ind. 239.

[2] *Supra*, ch. 2; 2 Kent Com. 208.

prescribe, by disinheriting the undutiful children by will;[1] a punishment found by no means terrible in cases which arise under the statute of Elizabeth. The moral obligation of honor and reverence still remains clear and unquestioned, so far as parental faithfulness has earned it; doubtful in its more extended application; yet always a favorite theme of the poet and dramatist; and never to be lightly esteemed among men.[2]

The law does not imply, then, a promise from the child to pay for necessaries, furnished without his request to an indigent parent; and the natural obligation can only be enforced in the mode pointed out by statute.[3] The promise of a child to pay for past expenditures in relief of an indigent parent is not binding in law.[4] But for necessaries or other goods furnished to the parent, or for the parent's benefit, at a grown child's request, the latter is chargeable, as any one else would be.[5] And it is held, further, that where one of several children renders support at the request of the others, they will be liable on an implied promise to contribute.[6] So much, then, for the duties of children.

§ 266. **Rights of Children in General.** — The rights of children with reference to their parents may be considered more at length. We have already had occasion to observe that the child may to a certain extent bind the parent as agent, not only for necessaries, but in some other transactions, where

[1] N. Y. Rev. Sts. p. 614; 2 Kent Com. 208; and see *Ex parte* Hunt, 5 Cow. 284.

[2] No one can read "King Lear" without recognizing the sublimity of an unquestioning faith in this moral duty. Kent (2 Com. 207) quotes the speech of Euryalus in the Æneid; but the instance of *pius Æneas* himself is still stronger, perhaps the strongest to be found in the classics; devotion to his aged father rendering him more illustrious in song than his heroic achievements, and, largely atoning, as some would say, for the sin of conjugal unfaithfulness.

[3] Rex *v.* Munden, 1 Stra. 190; Edwards *v.* Davis, 16 Johns. 281; Dawson *v.* Dawson, 12 Iowa, 512. See Johnson *v.* Ballard, 11 Rich. 178.

[4] Mills *v.* Wyman, 3 Pick. 207; Cook *v.* Bradley, 7 Conn. 57. It is otherwise by the Civil Code of Louisiana, art 245.

[5] Lebanon *v.* Griffin, 45 N. H. 558; Gordon *v.* Dix, 106 Mass. 305; Becker *v.* Gibson, 70 Ind. 239. Such a claim might now be enforced, in a suitable case, against the separate estate of a married daughter, on the usual principles applicable to her contracts.

[6] Stone *v.* Stone, 32 Conn. 142. And see Succession of Olivier, 18 La. Ann. 594; Marsh *v.* Blackman, 50 Barb. 329.

the child acts within the scope of authority properly conferred. But general transactions require proof of actual authority; and a son has ordinarily no more right, as such, to lend his father's goods than a stranger.[1] And proof that in one instance the use, by a son, of his father's name upon negotiable paper discounted at a bank, was known and acquiesced in by the father, is not proof that the son was authorized to sign subsequent notes in the same manner.[2] The principles of agency are here applied.[3]

§ 267. **The Emancipation of a Child.** — A father may emancipate his young child and thus give him a right to his own earnings. What, then, is emancipation as used with reference to the child? Plainly, the term emancipation is borrowed from the Roman law, and may be referred to the old formality of enfranchisement by the father. This in ancient times was done by an imaginary sale, but Justinian substituted the simpler proceeding of manumission before a magistrate.[4] In Louisiana, the emancipation of minors is expressly recognized and regulated by law.[5] At the English law, the term "emancipation" is generally used with reference to matters of parochial settlement and the support of paupers.[6] But in American cases it often has a significance more nearly approaching that of the civil law; though we are apt to use the word without much regard to precision.

We find in the English books little said as to the emancipation of minor children by their fathers. In fact, the English municipal system is so different from ours, that the paternal authority during the period of minority, except as to custody, gives rise to little controversy. But there is a case where an infant was held not to have been emancipated by his enlistment.[7] And in this and some other instances the principle of emancipation was somewhat discussed; and the doctrine

[1] Johnson *v.* Stone, 40 N. H. 197; *supra*, § 241. But see Bennett *v.* Gillett, 3 Minn. 423.

[2] Greenfield Bank *v.* Crafts, 2 Allen, 269.

[3] See also Sequin *v.* Peterson, 45 Vt. 255; *supra*, § 253.

[4] Burrill Law Dict. "Emancipation;" Bouvier, *ib.*; Inst. 1, 12.

[5] Code, art. 367 *et seq.*

[6] See 7 Q. B. 574, *n.*

[7] Rex *v.* Rotherfield Grays, 1 B. & C. 347.

has been maintained by Lord Kenyon and others, that during the minority of the child he will remain, under almost any circumstances, unemancipated; that in fact there can be no emancipation of an infant unless he marries, and so becomes himself the head of a family, or contracts some other relation, so as to wholly and permanently exclude the parental control.[1]

Emancipation is not so strictly construed in this country. The American doctrine, as frequently stated, is that a father may "emancipate" his child for the whole remaining period of minority, or for a shorter term; that this emancipation may be by an instrument in writing, by verbal agreement or license, or by implication from his conduct; and that emancipation is valid against creditors, and to some extent against the father.[2] Let us see then, *first*, how emancipation may in this country be legally brought about; *second*, what is its legal effect.

§ 267 *a*. **How a Minor Child is Emancipated; Parental Relinquishment of Right to Earnings.** — And *first*, emancipation may be either by instrument in writing or by parol agreement, or it may be inferred from the conduct of the parent. As to instruments in writing, usually known as indentures, the statutes of the different States are quite explicit; and the same general doctrines apply to children who are bound out as to apprentices generally.[3] But such deeds, so far as they derogate from the child's personal independence and welfare, are not greatly favored; they are usually construed with great strictness as between the minor and his parent, guardian, or master; and the policy of American law is to require the consent of the child himself to the instrument, where he has passed the period of nurture.[4]

[1] Rex *v.* Roach, 6 T. R. 247; Rex *v.* Wilmington, 5 B. & Ad. 525.

[2] Abbott *v.* Converse, 4 Allen, 530, per Chapman, J.; 2 Kent Com. 194, *n.*; Whiting *v.* Earle, 3 Pick. 201; Burlingame *v.* Burlingame, 7 Cow. 92; Varney *v.* Young, 11 Vt. 258; Rush *v.* Vought, 55 Penn. St. 437.

[3] 4 Com. Dig. 579; State *v.* Taylor, 2 Penning. 467; Bolton *v.* Miller, 6 Ind. 262. See "Master and Servant," *infra;* Nickerson *v.* Easton, 12 Pick. 110.

[4] The minor child of pauper parents is not emancipated so as to gain a settlement by the indenture of the selectmen. Frankfort *v.* New Vineyard, 48 Me. 565. But an indenture inoperative against the child by reason of informality may yet afford proof that the parent meant to relinquish the child's earnings. Kerwin *v.* Wright, 59 Ind. 369.

Next as to emancipation by parol agreement or license of the parent. In a well-considered Massachusetts case, it is decided that the emancipation of a minor child by parol agreement and without consideration is revocable, until acted upon.[1] Yet there can be little doubt at the present day that a father can verbally sell or give his minor son his time; and that after payment or performance the son is entitled to his earnings.[2] A special contract with a third person, authorizing him to employ and pay the child himself, will bind the parent, and payment to the child will be a defence against any action brought by his father against the employer. Parol agreements are, however, within the statute of frauds.[3]

Emancipation, strictly so called, is not to be presumed; it must be proved. Where it appears that the father, by parol, places his daughter in a certain family, that by the terms of the agreement the employer may turn her away when dissatisfied, that the father may rescind the contract at pleasure, and reclaim his daughter; these, and similar circumstances, may be sufficient to entitle the child to her own wages for the time being, but they cannot constitute emancipation as against the father.[4] We are to distinguish, in fact, between a license for the child to go out and work temporarily, and the more formal renunciation of parental rights. Thus, if the father agrees to pay his son so much for every day he would labor for another, but without intending to give him his time, and merely as an incentive to industry, this is not to be construed into a contract of emancipation, but rather as a mere gratuity to encourage the son in the formation of industrious and useful habits.[5] But other circumstances may raise a special contract on the minor's behalf, or indeed be held to emancipate him altogether. It is a well-settled rule in this country that if the parent absconds, turns his child

[1] Abbott *v.* Converse, 4 Allen, 530. See Morris *v.* Low, 4 Stew. & Port. 123. But see Chase *v.* Smith, 5 Vt. 556.

[2] Shute *v.* Dorr, 5 Wend. 204; Snediker *v.* Everingham, 3 Dutch. 143; Gale *v.* Parrott 1 N. H. 28; United States *v.* Metz, 2 Watts, 406; Corey *v.* Corey, 19 Pick. 29.

[3] Shute *v.* Dorr, 5 Wend. 204.

[4] Sumner *v.* Sebec, 3 Me. 223. See Clark *v.* Fitch, 2 Wend. 459; Clinton *v.* York, 26 Me. 167.

[5] Arnold *v.* Norton, 25 Conn. 92.

out of doors, or leaves him to shift for himself, the son is entitled to his own wages;[1] and our courts are very liberal in allowing children to avail themselves of any breach of parental obligation so as to earn an honest livelihood by their own toil.[2] The presumption raised in such cases may be termed a presumption of necessity. So where the husband abandons his child to the care of his mother, his subsequent claims for the earnings of either are to be regarded with very little favor.[3] Or where he is able to support the child, and yet forces the child to labor abroad unsuitably to the child's social position.[4] Even slighter circumstances, which impute no misconduct to the father, but evince a consent for his son to leave the parental roof and go into the world to seek his own fortune, are often construed into emancipation.[5] But the desertion of a minor from his father's home, with vagrancy and crime, does not of itself constitute emancipation.[6] And there may be complete emancipation, although the minor continues to reside with his father.[7] In general, according to modern American authorities, a parent's relinquishment, by agreement and consent, of all claim to the earnings of his minor child in any particular service, may be implied from circumstances.[8]

[1] And an insolvent father may give his son his time and future earnings, so as to benefit the child as against the father's own creditors. Atwood *v.* Holcomb, 39 Conn. 270; *supra*, § 252.

[2] Clinton *v.* York, 26 Me. 167; Cloud *v* Hamilton, 11 Humph. 104; Nightingale *v.* Withington, 15 Mass. 275; Stansbury *v.* Bertron, 7 W. & S. 362; Everett *v.* Sherfey, 1 Iowa, 356; The Etna, Ware, 462; Gary *v.* James, 4 Desaus, 185; Conovar *v.* Cooper, 3 Barb. 115; Jenison *v.* Graves, 2 Blackf. 440; Lyon *v.* Bolling, 14 Ala. 753; Ream *v.* Watkins, 27 Mo. 516.

[3] Wodell *v.* Coggeshall, 2 Met. 89. See Dennysville *v.* Trescott, 30 Me. 470.

[4] Farrell *v.* Farrell, 3 Houst. 633.

[5] Campbell *v.* Campbell 3 Stockt. 268; Johnson *v.* Gibson, 4 E. D. Smith, 231; Dicks *v.* Grissom, 1 Freem. Ch. 428; Dodge *v.* Favor, 15 Gray, 82; Boobier *v.* Boobier, 39 Me. 406. But see Stiles *v.* Granville, 6 Cush. 458.

[6] Bangor *v.* Readfield, 32 Me. 60.

[7] M'Closky *v.* Cyphert, 27 Penn. St. 220; Dierker *v.* Hess, 54 Mo. 246.

[8] *Supra*, § 252, 261; Monaghan *v.* School District, 38 Wis. 100; Dierker *v.* Hess, 54 Mo. 246. And this doctrine is applied the more strongly as against a parent's creditors and others, who, against the will of both parent and child, maintain that the child's earnings are not his own. The proof should be sufficient and clear as against the parent who denies such relinquishment. Monaghan *v.* School District, 38 Wis. 100. And see 72 Me. 509.

Remarriage of a widowed mother, whose new husband does not assume

The marriage of an infant, with his parent's consent, removes him from parental control, and, we may presume, gives him a right, as against the father, to apply all his earnings to the support of his family; but whether all the consequences of legal emancipation must necessarily follow is doubtful.[1] Marriage, without the consent of the parent, ought to confer the same right upon an infant, inasmuch as the claims of wife and child in either case are paramount, and the consequences of all marriages are much the same; but in Maine it has been decided otherwise, and that the disobedient infant is punishable by being compelled to pay his father his earnings; though what is to become of the wife meantime does not clearly appear.[2] A minor daughter is emancipated by her marriage with her father's consent; and here, at least, it is ruled that consent may be inferred from circumstances.[3]

§ 268. **Effect of Minor Child's Emancipation or Relinquishment.** — *Second.* As to the effect of emancipation. The consequence is on the one hand to give the child the right to his own wages, the disposal of his own time, and, in a great measure, the control of his own person; on the other hand to relieve the parent of all legal obligation to support.[4] Moreover, the emancipated child's earnings go to his administrator upon his decease, to be distributed according to law.[5]

A father may give to his son a part as well as the whole period of his minority, in which case the rights of the latter are limited accordingly.[6] If the father receives his son's earnings after giving the son his time, it will be a good consideration for any promise from the father.[7] And he cannot

the paternal functions towards the child, favors the idea of emancipation. Hollingsworth *v.* Swedenborg, 49 Ind. 378. A widowed mother may relinquish all claim. Lind *v.* Sullestadt, 21 Hun, 364. But as to a second marriage affecting the child's pauper settlement, see Hampden *v.* Troy, 70 Me. 484.

[1] Taunton *v.* Plymouth, 15 Mass. 203; Dicks *v.* Grissom, 1 Freem. Ch. 428.

[2] White *v.* Henry, 24 Me. 531. See Burr *v.* Wilson, 18 Tex. 367.

[3] Bucksport *v.* Rockland, 56 Me. 22.

[4] Nightingale *v.* Withington, 15 Mass. 272; Corey *v.* Corey, 19 Pick. 29; Hollingsworth *v.* Swedenborg, 49 Ind. 378; Varney *v.* Young, 11 Vt. 258; Johnson *v.* Gibson, 4 E. D. Smith, 231.

[5] Smith *v.* Knowlton, 11 N. H. 191.

[6] Tillotson *v.* M'Crillis, 11 Vt. 477. And see Winn *v.* Sprague, 35 Vt. 243; *supra*, § 252.

[7] Jenney *v.* Alden, 12 Mass. 375.

sue for the services of such son performed within the period embraced by the agreement, although he has given notice to the party employing the son not to pay his wages to him.[1] Nor can the father's creditors attach such earnings, or property which was purchased therewith for the infant's benefit.[2] But the child sues in such case for his own wages.[3] And if he is actually emancipated by his father, and an express promise is made to pay him for his labor, with the consent of his father, no other notice of his emancipation is necessary to charge the defendant and enable the minor to sue.[4] In brief, the minor who is released from his father's service stands as to his contracts for labor either with strangers or with him, upon the same footing as if he had arrived at full age; and such being the case, the father may himself contract to employ and pay the child for his services, and be bound in consequence like any stranger to fulfil his agreement.[5]

§ 269. **Rights of Full-grown Children.** — A child, on arriving at full age, becomes emancipated.[6] But whether son or daughter, the child, by continuing with the parent and living at the same home, may still be legally in the service of the parent. On this point there is no dispute; but in settling the presumptions of law there is apparently some conflict of authorities. Thus, where the parent sues for loss of services

[1] Morse *v.* Welton, 6 Conn. 547; Wodell *v.* Coggeshall, 2 Met. 89; Bray *v.* Wheeler, 29 Vt. 514.

[2] Chase *v.* Elkins, 2 Vt. 290; Weeks *v.* Leighton, 5 N. H. 343; M'Closkey *v.* Cyphert, 27 Penn. St. 220; Bobo *v.* Bryson, 21 Ark. 387; Lord *v.* Poor, 23 Me. 569; Lyon *v.* Bolling, 14 Ala. 753; Johnson *v.* Silsbee, 49 N. H. 543; Dierker *v.* Hess, 54 Mo. 246; Lind *v.* Sullestadt, 21 Hun, 364. As to an infant's suits, see *post*, Part V. c. 6. And see Benziger *v.* Miller, 50 Ala. 206. Recovery by the son in a suit would bar an action by the father. Scott *v.* White, 71 Ill. 287.

[3] Ream *v.* Watkins, 27 Mo. 516.

[4] Wood *v.* Corcoran, 1 Allen, 405. The earnings of an emancipated child cannot be attached by trustee process for the father's debts. Manchester *v.* Smith, 12 Pick. 113. And see Bray *v.* Wheeler, 29 Vt. 514.

The father cannot retract his consent that the child shall have his own wages after the wages are earned. Torrens *v.* Campbell, 74 Penn. St. 470.

[5] Steel *v.* Steel, 12 Penn. St. 64; Hall *v.* Hall, 44 N. H. 293. An emancipated child ceases to follow the settlement of his father. Orneville *v.* Glenburn, 70 Me. 353.

[6] 2 Kent Com. 206; Poultney *v.* Glover, 23 Vt. 328; Hardwick *v.* Paulet, 36 Vt. 320; *supra*, § 252.

because of the seduction of a grown-up or minor daughter, a strong disposition is frequently manifested to rule against complete emancipation so as to give damages. Where, however, the conflict is between parent and an adult child, over work done for a stranger, the tendency is in favor of complete emancipation, and to allow the child, attained to full age, the right to control his own wages; this being for his benefit.

If a child, after arriving at the age of twenty-one years, then, continues to live, labor, and render service in the father's family, with his knowledge and consent, but without any agreement or understanding as to compensation, the law raises no presumption of a promise to enable the child to maintain an action against the father to recover compensation.[1] The presumption here is, that the parties do not contemplate a payment of wages for services on the one hand, nor a claim for board and lodging on the other. For where the relation of parent and child exists, the law will not readily assume that of debtor and creditor likewise. But this presumption may be overthrown, and the reverse established, by proof of an express or implied contract; an implied contract being proven by facts and circumstances which show that both parties, at the time the services were performed, contemplated or intended pecuniary recompense.[2] The declarations of parents in matters of this sort, if somewhat vague, are not apt to be construed in the child's favor. And, on the other hand, the presumption is equally against regarding the services of a father who lives with his son and does work for him, as rendered for compensation; although, here, too, the

[1] Dye *v.* Kerr, 15 Barb. 444; Lipe *v.* Eisenlerd, 32 N. Y. 229; Mosteller's Appeal, 30 Penn. St. 473; Ridgway *v.* English, 2 N. J. 409; Andover *v.* Merrimack County, 37 N. H. 437; Williams *v.* Barnes, 3 Dev. 348; Prickett *v.* Prickett, 5 C. E. Green, 478; Perry *v.* Perry, 2 Duv. (Ky.) 312; Heywood *v.* Brooks, 47 N. H. 231; Wilson *v.* Wilson, 52 Iowa, 44, Gardner *v.* Schooley, 25 N. J. Eq. 150; Guffin *v.* First Nat. Bank, 74 Ill. 259; Pellage *v.* Pellage, 32 Wis. 136.

[2] Miller *v.* Miller, 16 Ill. 296; Fitch *v.* Peckham, 16 Vt. 150; Hart *v.* Hart, 41 Mo. 441; Updike *v.* Ten Broeck, 3 Vroom, 105; Freeman *v.* Freeman, 65 Ill. 106; Van Schoyck *v.* Backus, 16 N. Y. Supr. 68; Hilbish *v.* Hilbish, 71 Ind. 27; Steel *v.* Steel, 12 Penn. St. 66; Kurtz *v.* Hibner, 55 Ill. 514. The child may sue on a *quantum meruit*. Frier-

reverse might be established by evidence of a contract.[1] Circumstances which show an unusual burden assumed by the son, or special advantages reaped by the father, are sometimes favorably construed in the child's favor. As where a grown-up son purchases his father's farm and continues to support the father and an adult idiot brother upon it.[2] So where the adult son assumes entire control and management of the business, works the farm, and adds largely to the family profits by his extraordinary skill.[3] So where the son takes a deed of the farm on his agreement to support his parents there for the rest of their lives.[4] Such cases are by no means uncommon among the enterprising settlers of our Western country, who cultivate the soil and live in little colonies; and American courts cannot be insensible to the merits of young persons who adorn the filial relation. As to use and occupation of real estate, where the occupant is the son of the owner, it is held that while payment of rent may be presumed, slight evidence is sufficient to show the contrary.[5] But the rule in some of the older States is rather strict as against inferring that either support or service can create a debt.[6]

§ 270. **Gifts, &c., and Transactions between Parent and Child.** — Gifts between members of the same family are not greatly to be favored; and as to the father's alleged gift to his child, the presumption must be strongly in favor of the father's continued possession as head of the family. Yet where there is sufficient proof of a gift from father to child, fully executed by delivery, it will be upheld as irrevocable.[7] Such a gift should be perfected in order to be sustained afterwards against him. The parent's promise to give cannot be enforced on the child's behalf against him or his estate, on a mere consideration of love

muth *v.* Friermuth, 46 Cal. 42; Swartz *v.* Hazlett, 8 Cal. 118. See Tremont *v.* Mount Desert, 36 Me. 390; Leidig *v.* Coover's Ex'rs, 47 Penn. St. 534. But see Putnam *v.* Town, 34 Vt. 429.

[1] Harris *v.* Currier, 44 Vt. 468.

[2] House *v.* House, 6 Ind. 60.

[3] Adams *v.* Adams, 23 Ind. 50. And see Fisher *v.* Fisher, 5 Wis. 472.

[4] Pratt *v.* Pratt, 42 Mich. 174: Brown *v.* Knapp, 79 N. Y. 136.

[5] See Oakes *v.* Oakes, 16 Ill. 106; Hays *v.* Seward, 24 Ind. 352. And see Whipple *v.* Dow, 2 Mass. 415.

[6] Davis *v.* Goodenow, 27 Vt. 717; Seavey *v.* Seavey, 37 N. H. 125.

[7] Kellogg *v.* Adams, 51 Wis. 138.

and affection. But the parent in equity may settle property on his children as well as his wife, upon principles elsewhere discussed.[1] And if a valuable consideration be interposed, the settlement is supported more firmly; and specific performance of an executory promise to transfer may be in some instances decreed.[2]

On the other hand, while an adult child may make a binding transfer or conveyance of property to the parent, any such transfer by way of gift or improvident contract, made just after attaining majority, or while in general under undue parental control and influence, will be jealously regarded by courts of equity.[3] The same doctrine holds true of a transfer or conveyance to an adult child, tainted with undue influence over an aged or infirm parent. All family arrangements of the filial kind, whether child or parent be the weaker party should, in order to stand firmly, be free from fraud or undue influence on both sides, and made in good faith; or equity will readily set them aside.[4]

To support, however, a general contract between a parent and his adult child, as against strangers, a slight consideration is often held sufficient. And a deed of personal property from parent to child, the parent not being indebted at the time, by which it is agreed that the parent shall keep possession during life, is not considered void.[5] So it is held that a bond executed by a son to his parent for $500, with interest semi-annually if demanded, is on valuable consideration, sufficient to sustain a conveyance of land as a purchase.[6] And even a deed from a parent to a child for the consideration of love and affection is not absolutely void as against creditors. The want of a valuable consideration may be a badge of

[1] *Supra*, Part II, c. 14.

[2] As where a writing declared a valuable consideration for the promise to convey land, and actual entry and improvement had taken place upon the faith of the contract. Hagar *v.* Hagar, 71 Mo. 610. And see Hiatt *v.* Williams, 72 Mo. 214; Kurtz *v.* Hibner, 55 Ill. 514.

[3] See Guardian and Ward, *post*, Part IV. c. 9.

[4] Taylor *v.* Staples, 8 R. I. 170; Van Donge *v.* Van Donge, 23 Mich. 321; Rider *v.* Kelso, 53 Iowa, 367; Miller *v.* Simonds, 72 Mo. 669; Jacox *v.* Jacox, 40 Mich. 473.

[5] Bohn *v.* Headley, 7 Har. & J. 257; Shepherd *v.* Bevin, 9 Gill, 32.

[6] Jackson *v.* Peek, 4 Wend. 300.

fraud; but if so, it is only presumptive, not conclusive, evidence of it, and may be met and rebutted by opposing evidence.[1] This is the American rule; but, as we have seen, the statutes of Elizabeth with reference to voluntary settlements do not receive a uniform interpretation in our State courts. There are doubtless circumstances under which a father's voluntary settlement, whether upon minor or adult children would be set aside as a fraud upon subsequent, and still more upon existing creditors.[2]

Where a son purchases and stocks a farm as a home for an indigent father, who resides and labors thereon, the products are not subject to attachment as the son's property.[3] On the other hand, where a parent permits the child to receive and invest his earnings, the benefit of the investment belongs to the child, especially as against creditors of the father.[4] And in some States, a minor child who improves and settles a tract of land with the father's permission may acquire a title by making valuable improvements as effectually as if he were of age.[5]

§ 271. **Same Subject; English Cases.**—The English cases are few as to transactions strictly between parent and child; and these turn chiefly upon trusts and family settlements. There are recent cases where the transactions of children with fortunes have been set aside in equity, for undue influence exerted over them by their parents. Thus a mortgage and subsequent sale by a son just arrived at full age, effected under the father's influence, and to his own injury, has been

[1] Hinde's Lessee *v.* Longworth, 11 Wheat. 213; Seward *v.* Jackson, 8 Cow. 406; Haines *v.* Haines, 6 Md. 435.

[2] See *supra*, §§ 185–188. And see Carter *v.* Grimshaw, 49 N. H. 100; Wilson *v.* Kohlheim, 46 Miss. 346; Kaye *v.* Crawford, 22 Wis. 320; Monell *v.* Scherrick, 54 Ill. 269; Gardner *v.* Schooley, 25 N. J. Eq. 150; Guffin *v.* First National Bank, 74 Ill. 259. No express contract need be proved to enable a son to recover from his father's estate for a house built by the son on the father's land in the lifetime of the latter, with the latter's knowledge and consent. Byers *v.* Thompson, 66 Ill. 421; Kurtz *v.* Hibner, 55 Ill. 514; Hillebrands *v.* Nibbelink, 44 Mich. 413.

[3] Brown *v.* Scott, 7 Vt. 57.

[4] Campbell *v.* Campbell, 3 Stockt. 268; Stovall *v.* Johnson, 17 Ala. 14; Wilson *v.* McMillan, 62 Ga. 16.

[5] Galbraith *v.* Black, 4 S. & R. 207. See Jenison *v.* Graves, 2 Blackf. 441. But see Bell *v* Hallenback, Wright, 751; Fonda *v.* Van Horne, 15 Wend. 631; Brown *v.* M'Donald, 1 Hill Ch. 297.

annulled.[1] So with a gift from child to parent, though not unless a suit to set the gift aside be instituted in due time.[2] The principle of equity is, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete emancipation, without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child; and that it is the business and the duty of the party who endeavors to maintain such a transaction, to show that such presumption is adequately rebutted; but that the presumption may always be removed.[3] On the other hand, in transactions between members of the same family, even though that relation subsists between them, from whence the court will infer the moral certainty of the existence of considerable influence, and the probability of its having been exercised, yet if the transaction be one that tends to the peace or security of the family, to the avoiding of family disputes and litigation, or to the preservation of the family property, the principles by which such transactions must be tried are not those applicable to dealings between strangers, but such as on the most comprehensive experience have been found to be most for the interest of families.[4]

§ 272. **Advancements and Distributive Shares; Expectancies of Heirs.** — If the father, during his lifetime, makes an advancement to any of his children, towards their distributive share in his estate, the rule is to reckon this in making the

[1] Savery *v.* King, 35 E. L. & Eq. 100. And see Baker *v.* Bradley, ib. 449.

[2] Wright *v.* Vanderplank, 39 E. L. & Eq. 147; Turner *v.* Collins, L. R. 7 Ch. 329.

[3] Archer *v.* Hudson, 7 Beav. 551, per Lord Langdale. See Houghton *v.* Houghton, 11 E. L. & Eq. 134; s. c. 15 Beav. 278, where this subject is fully discussed. See also American case of Bergen *v.* Udall, 31 Barb. 9.

[4] Master of Rolls in Houghton *v.* Houghton, *supra*.

An imbecile father living with his grown children may have a notice to quit served by delivery to one of them in such a manner as to entitle the landlord to maintain ejectment against the father, to whom the notice had been addressed. Tanham *v.* Nicholson, L. R. 5 H. L. 561. Mortgage by emancipated children over age, to secure a debt of their father, upheld in favor of the mortgagee, but not in favor of the father. Bainbridge *v.* Brown, 50 L. J. Ch. 522.

distribution.[1] In England, it would appear that acts of the father have often been so construed, under the statute of distributions, with less reference to intention of the parties than the requirements of equal justice. Thus annuities are reckoned an advancement; contingent provisions; large premiums for a trade or profession; and loans of considerable importance to a son.[2] But small and inconsiderable sums for current expenses, ornaments, and the education of children are not so reckoned.[3] Nor is the payment to the daughter's husband of £1,000, jocularly stated by the father to be in exchange for his snuff-box, to be considered an advancement to the daughter.[4]

The rule in this country does not appear to be very strict; and in some States the statutes of distributions, unlike those of England, permit nothing to be reckoned as an advancement to a child by the father, unless proved to have been so intended and chargeable on the child's share by certain evidence prescribed.[5] And it is laid down that whether a provision of the deceased in his lifetime be a gift or an advancement is a question of intention; but that if it was originally intended by both as a gift, it cannot subsequently be treated by the father as an advancement, at least without the son's knowledge or consent.[6] Yet it is also ruled that if a son

[1] 2 Redf. Wills, 908 *et seq.*; Edwards *v.* Freeman, 2 P. Wms. 435.

[2] Smith *v.* Smith, 3 Gif. 263; 2 Wms. Ex'rs, 1385; Edward *v.* Freeman, 2 P. Wms. 435; 2 Redf. Wills, 908, 909; Boyd *v.* Boyd, L. R. 4 Eq. 305.

[3] 2 Wms. Ex'rs, 6th Am. ed. 1498–1505. And see Miller's Appeal, 40 Penn. St. 57.

[4] McClure *v.* Evans, 29 Beav. 422. And see Stock *v.* McAvoy, L. R. 15 Eq. 55.

In a modern English case a father lent the sum of £10,000 to his son, to assist him in forming a partnership in the business of a sugar-refiner, and took his promissory note for the repayment of that sum on demand. It appeared that the son engaged in business at the urgent desire of his father; that finding it was a losing concern he became desirous of retiring, but remained at the urgent request of his father and continued the business with reluctance, sustaining heavy losses. The father on his death-bed caused the promissory note to be burned, and died intestate. It was held that although the circumstances under which the note had been destroyed amounted to an equitable release of the debt; yet, that the sum which remained due on it must be considered an advancement to the son. Gilbert *v.* Wetherell, 2 Sim. & Stu. 254, per Sir John Leach, M. R. But see Auster *v.* Powell, 31 Beav. 583, and *n.* And see Bennett *v.* Bennett, L. R. 10 Ch. D. 474.

[5] Osgood *v.* Breed's Heirs, 17 Mass. 356; 2 Redf. Wills, 908, 909.

[6] Lawson's Appeal, 23 Penn. St.

during his father's life receipts for and actually receives his "full proportion" during his father's life, he can claim nothing more from the estate after his father's death.[1] Advancements do not bear interest.[2]

Where the child of a father dying intestate has received an advancement, in real or personal estate, and wishes to come into the general partition or distribution of the estate, he may bring his advancement into *hotchpot* with the whole estate of the intestate, real and personal; and shall thereupon be entitled to his just proportion of the estate. This is the English rule, and it prevails likewise in many of the United States.[3] In such case the value of the property at the time of advancement governs in the distribution.[4] The principle of this rule is equality of distribution of the ancestor's personal estate among his children and their descendants.

The sale of expectant estates by heirs is not to be encouraged; one reason being that it opens the door to taking undue advantage of an heir in distressed and necessitous circumstances; the other that public policy should prevent an heir from shaking off his father's authority and feeding his extravagance by disposing of the family estate.[5] The principle was formerly laid down with much emphasis in Massachusetts.[6] But the present rule of chancery is to support such

85; Sherwood *v.* Smith, 23 Conn. 516. See Black *v.* Whitall, 1 Stockt. 572; Storey's Appeal, 83 Penn. St. 89.

[1] Cushing *v.* Cushing, 7 Bush, 259.

[2] Osgood *v.* Breed's Heirs, 17 Mass. 356; Nelson *v.* Wyan, 21 Mo. 347. A transaction between parent and child may constitute a loan rather than either gift or advancement. Bruce *v.* Griscom, 16 N. Y. Supr. 280. As to proof of an advancement, see Bulkley *v.* Noble, 2 Pick. 337; and see Hartwell *v.* Rice, 1 Gray, 587; Miller's Appeal, 40 Penn. St. 57; Smith *v.* Smith, 59 Me. 214; Vanzant *v.* Davies, 6 Ohio St. 52; 2 Story Eq. Juris. § 1202; Brown *v.* Burk, 22 Ga. 574; Cleaver *v.* Kirk, 3 Met. (Ky.) 270; Hodgson *v.* Macy, 8 Ind. 121; Vaden *v.* Hance, 1 Head, 300; Fulton *v.* Smith, 27 Ga. 413; Montgomery *v.* Chaney, 13 La. Ann. 207.

[3] 2 Bl. Com. 516; 2 Wms. Ex'rs, 1386; 2 Kent Com. 421; Jackson *v.* Jackson, 28 Miss. 674; Barnes *v.* Hazleton, 50 Ill. 429.

[4] See Jenkins *v.* Mitchell, 4 Jones Eq. 207. For the New York rule, see Terry *v.* Dayton, 31 Barb. 519; Beebe *v.* Estabrook, 18 N. Y. Supr. 523.

[5] Per Lord Thurlow, 1 Bro. C. C. 10; Co. Litt. 265 *a*; Sugd. Vendors, 314, and cases cited; 1 Story Eq. Juris. §§ 336-339.

[6] But see Trull *v.* Eastman, 3 Met. 121; *contra*, Boynton *v.* Hubbard, 7 Mass. 112. See Varick *v.* Edwards, 1 Hoff. Ch. 383; 2 Kent Com. 475, and cases cited.

sales to others, if made *bona fide*, and for valuable consideration; and in case of an heir apparent, if the instrument be made with the knowledge and consent of the father.[1] Whether, however, the son can release to the father himself, so as to operate further than as a receipt for property advanced to him, is more doubtful.[2]

Where a legacy is given by a parent to his child, or by one *in loco parentis*, by way of maintenance, the child as legatee is privileged in being allowed interest thereon from the testator's death; this so as to secure the child's prompt and full support. And the presumptive right to interest is held to be all the same, notwithstanding the child has no guardian,[3] or the testator was not obliged to render support;[4] but not where the will makes other express provision for maintenance.[5]

The child's right of inheritance from his parent, it may be added, is strongly favored both in England and America. But while in the former country the eldest son is so far preferred to the other children that he shall take the whole real estate by descent to himself, the American rule is that all children shall inherit alike, whether sons or daughters. And a father's will is to be construed with favor to his own offspring; indeed, some of our local statutes expressly provide that when a testator omits to provide for any children, they shall take the same share of the testator's estate, both real and personal, that would have passed to them if the parent had died intestate, unless they had other provision during the testator's life, or it clearly appears that the omission was intentional on his part.[6]

[1] Curtis *v.* Curtis, 40 Me. 24.

[2] See Robinson *v.* Robinson, Brayt. 59; Walker *v.* Walker, 67 Penn. St. 186. The agreement of children without their father's knowledge to release all rights of inheritance in land to one, if that one would maintain the father for life, is not against public policy, but may be upheld in equity. Walker *v.* Walker, *ib.*

[3] 2 Redf. Wills, 267; Kent *v.* Dunham, 106 Mass. 586; Fowler *v.* Colt, 22 N. J. Eq. 44.

[4] For the testator might have intended support from the legacy. Brown *v.* Knapp, 79 N. Y. 136.

[5] *In re* George, 47 L. J. Ch. D. 118.

[6] See Mass. Gen. Stats. c. 92, § 25; Schoul. Pers. Prop. 730, 748; 2 Kent Com. 421; 4 Kent Com. 471 · 1 Jarm. Wills, 5th Am. ed. 129, *n.*

§ 273. **Stepchildren; Quasi Parental Relation.** — It is well settled that in the absence of statutes a person is not entitled to the custody and earnings of stepchildren, nor bound by law to maintain them.[1] Yet, if a stepfather voluntarily assumes the care and support of a stepchild, he stands *in loco parentis;* and the presumption then is, that they deal with each other as parent and child, and not as master and servant; in which case the ordinary rules of parent and child will be held to apply; and consequently neither compensation for board is presumed on the one hand, nor for services on the other.[2] So may this *quasi* relation exist between the child and some other person, — such as a grandfather, — and with similar legal consequences.[3] As to third parties, the test is whether one has held out the child as a member of his own family.[4]

§ 274. **Claims against the Parental Estate for Services rendered.** — Claims for services rendered to a parent, a relative,

[1] Tubb *v.* Harrison, 4 T. R. 118; 2 Kent Com. 192; Freto *v.* Brown, 4 Mass. 675; Worcester *v.* Marchant, 14 Pick. 510; *supra*, § 237.

[2] Cooper *v.* Martin, 4 East, 77; Williams *v.* Hutchinson, 3 Comst. 312; Sharp *v.* Cropsey, 11 Barb. 224; Murdock *v.* Murdock, 7 Cal. 511; Gillett *v.* Camp, 27 Mo. 541; Hussee *v.* Roundtree, Busbee, 110; Lantz *v.* Frey, 14 Penn. St. 201; Davis *v.* Goodenow, 27 Vt. 715; Brush *v.* Blanchard, 18 Ill. 46; St. Ferdinand Academy *v.* Bobb, 52 Mo. 357; Smith *v.* Rogers, 24 Kan. 140; Mowbry *v.* Mowbry, 64 Ill. 383. As to a stepson remaining after attaining majority, see Wells *v.* Perkins, 43 Wis. 160.

[3] Hudson *v.* Lutz, 5 Jones, 217; Butler *v.* Slam, 50 Penn. St. 456; Schrimpf *v.* Settegast, 36 Tex. 296; Hays *v.* McConnell, 42 Ind. 285; Windland *v.* Deeds, 44 Iowa, 98. But the presumption, as between son-in-law and father-in-law, is that they deal on the mutual footing of debtor and creditor. Wright *v.* Donnell, 34 Tex. 291; Schoch *v.* Garrett, 69 Penn. St. 144; Rogers *v.* Millard, 44 Iowa, 466. But cf. *supra*, Hus. & Wife, § 71. All this is matter of evidence upon the facts. Coe *v.* Wager, 42 Mich. 49.

[4] St. Ferdinand Academy *v.* Bobb, 52 Mo. 357.

As to an adopted child, the doctrine *in loco parentis* applies as to services and wages. Brown *v.* Welsh, 27 N. J. Eq. 429. See *supra*, § 232. In the case of distant relatives and strangers, the presumption that one goes to live in the household on the footing of member of the family instead of servant is less strong than where one is a child; and this presumption is more readily overcome by circumstantial evidence. Thornton *v.* Grange, 66 Barb. 507; Tyler *v.* Burrington, 39 Wis. 376; Neal *v.* Gilmore, 79 Penn. St. 421. And as to inferring a claim for a young child's support against the child's own parent, see Carroll *v.* McCoy, 40 Iowa, 38; Thorp *v.* Bateman, 37 Mich. 68. As to strangers, indeed, old enough to perform valuable service beyond the worth of support, the presumption is rather that

or some one standing in place of a parent, are not unfrequently presented against the estate of a parent after decease. Thus, where an adult child resides with and performs valuable service for the parent, an understanding may be shown between them of recompense either in money or by way of testamentary provision under the parent's will. In meritorious instances, and particularly where the parent was long sick and infirm, and the child performed indispensable functions, or where by personal labor and skill the child enhanced the value of the parental estate, a mutual intention to this effect may be readily inferred from the circumstances; and where, from some consistent cause, no such testamentary provision has been made, compensation will be allowed out of the deceased parent's estate upon the usual footing of a creditor's claim.[1] Presumptions, however, as we have seen, are unfavorable, and must be overcome; and so, too, presumptions are against the reimbursement of parental care and trouble bestowed upon offspring.[2]

Where the relationship was more distant, or the parties concerned were not kindred at all or united by marital ties, the inference of a promise to recompense the service rendered is of course more readily raised, whether the claim be presented against the person served, or against his estate, upon his decease.[3]

§ 275. **Suits between Child and Parents.** — It is intimated in a recent case that, while one occupying the *quasi* parental relation towards a minor stranger by blood may claim that

of a contract relation for compensation. In general, the estate of one who has contracted for services to be rendered to the family is liable for the same performed after his death. Toland *v.* Stevenson, 59 Ind. 485; Frost *v.* Tarr, 53 Ind. 390; Hauser *v.* Sain, 74 N. C. 552; Shakespeare *v.* Markham, 17 N. Y. Supr. 311.

[1] Freeman *v.* Freeman, 65 Ill. 106; Markey *v.* Brewster, 17 N. Y. Supr. 16. Specific performance has been decreed of a promised conveyance in consideration, even though the will were insufficient. Hiatt *v.* Williams, 72 Mo. 214. As to persons in general performing service in expectation of a legacy, mere expectation cannot create an enforceable contract; but a mutual understanding, if shown, may afford the basis of a valid claim against an estate. See Shakespeare *v.* Markham, 17 N. Y. Supr. 311, 322, and cases cited.

[2] Seitz's Appeal, 87 Penn. St. 159. See *supra*, § 238.

[3] Briggs *v.* Briggs, 46 Vt. 571; Morton *v.* Rainey, 82 Ill. 215.

the child's services are offset by the maintenance, care, and education he has bestowed upon him, the failure to provide properly while the child rendered services raises a liability for those services which the child, on attaining majority, may enforce.[1] The question, moreover, is sometimes raised in these days, whether a young son or daughter occupying the filial relation may not, on becoming of age, sue the parent or *quasi* parent for alleged maltreatment or other injury.[2] With reference to a blood parent, however, all such litigation seems abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household. An unkind and cruel parent may and should be punished at the time of the offence, if an offender at all, forfeiting custody and suffering criminal penalties, if need be; but for the minor child who continues, it may be for long years, at home and unemancipated, to bring a suit, when arrived at majority, free from parental control and under counter-influences, against his own parent, either for services accruing during infancy or to recover damages for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. The courts should discourage such litigation; and so upon corresponding grounds the parent's suit as to cause of action referable to the period and relation of tender childhood.[3]

[1] Schrimpf *v.* Settegast, 36 Tex. 296.

[2] The writer is informed of a *nisi prius* Maine case tried about the close of 1880 (French *v.* Allen), where a daughter, aged 23, joined with her husband in an action for an alleged assault committed upon her when she was eleven years old. The trial resulted in a verdict for the defendant, and the plaintiffs did not proceed farther; consequently the case is not reported.

[3] Clear precedents are wanting on these points; but the policy of the common law appears to be hostile to permitting such suits. Parent and child do not stand strictly as *sui juris* regarding the world or one another; but infancy is usually taken to be a relation analogous at common law to that of coverture. Now as to coverture, it is clear that from regard to the peace of society the common law forbade husband and wife to sue one another in damages for breach of the marital rights; though conceding that the breach of obligation on one side might release from obligation on the other; that there might be indirect redress, separation, &c. See Schoul. Hus. & Wife, § 72. Even after a divorce, it is recently held that the sanctity of the marriage union shall not be disturbed by such litigation between the divorced spouses. *Ib.* § 561; Abbott *v.* Abbott, 67 Me. 304. Of course one spouse might be held criminally responsible at the time

Equity, however, regards the rights of parent and child, as well as of husband and wife, and separates their property interests.[1] An oppressive contract relative to property extorted by a parent from the child, or by an adult child from the parent, may doubtless be relieved against.[2]

CHAPTER VI.

ILLEGITIMATE CHILDREN.

§ 276. **Illegitimate Children; Their Peculiar Footing.** — Illegitimate children, or bastards, stand upon a different footing from legitimate children. We have already seen that bastards may be legitimated in many of the United States, by the subsequent marriage of their parents or otherwise. The rights and disabilities of bastards, as such, and while continuing illegitimate, require our present attention.

The rights of a bastard are very few at the common law; children born out of a legal marriage having been from the earliest times stigmatized with shame, and made to suffer through life the reproach which were rightfully visited upon those who brought them into being. The dramatist depicts the bastard as a social Ishmaelite, ever bent upon schemes for the ruin of others, fully determined to prove a villain; thus fitly indicating the public estimate of such characters centuries ago in England. The law-writers, too, pronounce the bastard to be one whose only rights are such as he can acquire; going so far as to demonstrate, by cruelly irresistible logic, that an illegitimate child cannot possibly inherit, because he is the son of nobody; sometimes called *filius nullius*, and

for a personal wrong against the other. Equity, with reference to property and adverse interests therein, regards married parties as subject, moreover, to litigation; but that is something quite different so far as public policy and the interests of society are concerned. It seems to us that these analogies have a close application to the filiai relation. And suits on an injured infant's behalf, ought, if allowable at all, to be allowed at or about the time of the parental breach, only to the infant suing by next friend. And the more essential point is to get rid of the cruel custodian, as a child, under fit circumstances, may. See, as to actions by or against infants, *post*, Part V. c. 6.

[1] *Post*, Part V. c. 6.

[2] Bowe *v.* Bowe, 42 Mich. 195.

sometimes *filius populi*.[1] Coke seemed to concede a favor in admitting that the bastard might gain a surname by reputation, though none by inheritance.[2]

§ 277. **Disability of Inheritance.** — The most important disability of an illegitimate child at the common law, is that he has no inheritable blood; that he is incapable of becoming heir, either to his putative father or to his mother, or to any one else; that he can have no heirs but those of his own body.[3] This was likewise the doctrine of the civil law; the language of the Institutes as to spurious offspring, *patrem habere non intelliguntur*, dealing rather more gently with a fact so extremely delicate and painful.[4] At the old canon law a bastard was treated as also disqualified from holding dignities in the church; but this doctrine became exploded long ago. "And really," adds Blackstone, with warmth, as if to atone for a long and fallacious argument against legitimation by a subsequent marriage, "any other distinction but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree."[5] And so might the commentator of the commentaries stigmatize the efforts of those who have nothing better to urge against human rights, than the importance of preserving the symmetry of the law unimpaired.

The civil law, while offering in certain cases a hope of legitimation, made a distinction between spurious offspring born of promiscuous intercourse, and such as were conceived or born during the marriage of one of the natural parents; presuming that while the former might be rendered legitimate, the latter never could become so.[6] And the rule was more severe with the one class than the other. This principle is to be traced in the provisions of the Louisiana Code; children whose father is unknown and adulterous or incestu-

[1] Fort. de Ll. ch. 40; 1 Bl. Com. 458.

[2] Co. Litt. 3. The very term "bastard," said to be derived from the Saxon words "base start," expresses contempt. See Fraser Parent & Child, 119.

[3] 2 Kent Com. 212; 1 Bl. Com. 459.

[4] Inst. 1, 10, 12; 2 Kent Com. *ib.*

[5] 1 Bl. Com. 459.

[6] 1 Dig. 5, 23; Fraser Parent & Child, 119.

ous children having no right of inheritance, while other natural or illegitimate children succeed to the estate of their mother in default of lawful children or descendants, and under certain conditions to the estate of the father who has acknowledged them.[1]

The well-settled American rule, however, differs considerably from that of both civil and common law. We have already noticed that legitimation by subsequent marriage is a principle admitted very generally in the legislation of the different States. So, too, are there various statutes which permit even bastard children to inherit from the father under certain restrictions; while the generally recognized doctrine is *partus sequitur ventrem*, and that the illegitimate child and his mother shall mutually inherit from each other. Thus, by recent statutes in Maine, the mother of an illegitimate child can inherit. In Massachusetts, the illegitimate is an heir to his mother. In New York, in default of lawful issue of the mother, her illegitimate children may inherit her real and personal estate. In Pennsylvania, bastards shall bear the name of the mother, and she and they shall inherit from each other. Certain kindred of the bastard's mother, in Georgia and Alabama, had rights of distribution under still earlier statutes. In Tennessee and some other States, a liberal rule is applied with respect to mother and brothers and sisters.[2] In Maryland, illegitimates may inherit from the mother and from illegitimate brothers and sisters; though illegitimates cannot take from the legitimate, neither legitimates from the illegitimate.[3] And, about fifty years ago, Kent instanced twelve States where bastards could inherit from, and transmit to, their mothers, real and personal estate, under some modifications; while in New York, the mother and her kindred could inherit from her bastard offspring.[4] There is scarcely

[1] See 2 Kent Com. 213.

[2] Lewis *v.* Eutsler, 4 Ohio St. 354; Opdyke's Appeal, 49 Penn. St. 373; Hawkins *v.* Jones, 19 Ohio St. 22; Riley *v.* Byrd, 3 Head, 20.

[3] Miller *v.* Stewart, 8 Gill, 128; Earle *v.* Dawes, 3 Md. Ch. 230.

[4] See 2 Kent Com. 11th ed. 212, 213, and notes. And as to inheritance from the father, see *supra*, 229. These statutes of inheritance are not generally to be extended so as to apply to grandchildren and grandparents, in a case of illegitimacy. See Steckel's Appeal, 64

a State in the Union which has not departed widely from the policy of the English common law; and statutes, which happily have required as yet very little judicial interpretation, perpetuate the record of our liberal and generous public policy towards a class of beings who were once compelled to bear the iniquities of the parent.

§ 278. **Mother preferred to the Putative Father; Custody.** — The doctrine that a natural tie connects the illegitimate child peculiarly with his mother was recognized at the civil law; for, under the ordinance of Justinian, the bastard might to a certain extent inherit from his mother.[1] So at the common law have the obligations of consanguinity between the mother and her illegitimate offspring been applied in several instances. But as concerns any exclusive privileges on behalf of the mother, this does not seem very clear; for in a case which was decided in 1786, the rights of the putative father seemed to be placed on much the same footing as in other cases; and his consent was deemed *prima facie* essential under the marriage act of 26 Geo. I.; so was his right apparently admitted to take his illegitimate child out of the parish.[2]

There are, to be sure, occasional *dicta* to the effect that the putative father has no common-law right to the custody of the child as against the mother, and that certainly within the age of nurture, that is, under the age of seven, the mother has the exclusive right to the custody. The more correct statement, however, is that pauper children, whether legitimate or not, are under the English system made inseparable

Penn. St. 493; Berry *v.* Owens, 5 Bush, 452. For construction of the word "illegitimate" see Miller *v.* Miller, 25 N. Y. Supr. 507. An illegitimate child can administer on his father's estate as against the father's brother. *Re* Pico, 52 Cal. 84. In general, an illegitimate child, where there was no subsequent marriage of the parents, nor adoption, cannot inherit from the putative father. As to such acts of inheritance, a child is rendered legitimate only *sub modo*. Neil's Appeal, 92 Penn. St. 193.

A child begotten of a mother who had married in good faith, not knowing that a legal impediment to the marriage existed, is treated with favor. Harrington *v.* Barfield, 30 La. Ann. 297. By local statutes the legitimacy of such offspring is preserved in annulling such marriages, as we have seen, *supra*, Part II. c. 1.

[1] Code, lib. 6, 57. See 2 Kent Com. 214.

[2] King *v.* Hodnett, 1 T. R. 96, and cases cited *passim*; Macphers. Inf. 67.

from the mother within the years of nurture; and that at common law neither the putative father nor the mother of an illegitimate child had any exclusive right of guardianship.[1] The common-law cases cited in the mother's favor are only to the effect that where a bastard child within the period of nurture is in the peaceable possession of the mother, and the putative father gets possession of the child by force or fraud, the court will interfere to put matters in the same situation as before.[2] Both Lord Kenyon and Lord Ellenborough — the latter as late as 1806 — expressed doubts as to whether the court would take away the custody of an illegitimate child from the father who had fairly obtained possession, and award it to the mother.[3]

Nor do the later English cases aid greatly in clearing up the doubt on this point. Lord Mansfield regarded the law as doubtful in his day, while himself inclining strongly to the opinion that the putative father had no right to his child's custody.[4] In 1841, a case came before the Court of Common Pleas, on a writ of *habeas corpus*, applied for by the mother, the child being then between eleven and twelve years of age, and in the custody of her putative father. But the child was deemed old enough to exercise her own discretion as to where she would go; and as she appeared unwilling to go with her mother, the court would not permit the mother to take her by force.[5]

The chancery courts have in several instances favored the father of an illegitimate child to the exclusion of his mother. Thus, while the practice is not to appoint the putative father guardian of his illegitimate child having no property, unless he makes a settlement upon him; yet, if he does so, his appointment is favorably regarded. No special regard seems to

[1] Macphers. Inf. 67.

[2] Rex *v.* Soper, 5 T. R. 278; Rex *v.* Hopkins, 7 East, 579; Rex *v.* Moseley, 5 East, 223.

[3] Per Lord Kenyon, Rex *v.* Moseley, *supra* (1798); per Lord Ellenborough, Rex *v.* Hopkins, *supra*.

[4] Strangeways *v.* Robinson, 4 Taunt. 498. And see Pope *v.* Sale, 7 Bing. 477.

[5] *In re* Lloyd, 3 Man. & Gr. 547. Comparing all the *dicta* in the foregoing cases carefully together, it will be seen that they are not decidedly against the putative father's right of custody.

have been paid to the mother of such children.[1] And while the committee of a lunatic might petition for an allowance for his bastard offspring, their mother might not.[2]

But the language of the new poor laws of England (after many changes) is favorable to the mother's special claims; being to the effect that the mother is in any case bound to maintain her bastard child under sixteen, unless such child meantime marries or acquires a settlement of its own; and that such child shall follow the settlement of the mother.[3] And if, being of ability, she neglects to support such child, whereby it becomes chargeable to the parish, she may be punished under the vagrant acts.[4] Another section of the act of 4 & 5 Will. IV., which provides that the husband shall support stepchildren of his wife, includes in its terms illegitimate as well as legitimate children, and so far favors a husband's right of custody; but that provision covers only a very limited ground.[5]

The rights of the parents of bastards are regulated to a great extent in the United States by statute; and our policy is in general more favorable than that of England, as to the mother's rights. An illegitimate child follows the settlement of his mother in New York and some other States.[6] But in Connecticut the rule is that a bastard is settled where born, like any other child, and that his settlement follows that of the putative father.[7] In New York again, ever zealous in guarding the interests of women and children, it is broadly ruled that, as against the mother of a bastard child, the putative father has no legal right of custody; that the mother, as its natural guardian, is bound to maintain it; and that she is entitled to control it.[8] Stratagem and force on the part of the putative father always furnish good grounds for restora-

[1] Macphers. Inf. 110.

[2] *Re* Jones, 5 Russ. 154.

[3] 4 & 5 Will. IV. c. 76, § 71.

[4] 7 & 8 Vict. c. 101; 8 & 9 Vict. c. 10.

[5] 4 & 5 Will. IV. c. 76, § 51. See comment of Maule, J., *In re* Lloyd, 3 Man. & Gr. 547.

[6] See 2 Kent Com. 214; Canajoharie *v.* Johnson, 17 Johns. 41; Petersham *v.* Dana, 12 Mass. 429; Lower Augusta *v.* Salinsgrove, 64 Penn. St. 166.

[7] Bethlem *v.* Roxbury, 20 Conn. 298. And see Smith *v* State, 1 Houst. C. C. 107.

[8] People *v.* Kling, 6 Barb. 366; Robalina *v.* Armstrong, 15 Barb. 247.

tion of the child to the mother.[1] And the Roman, Spanish, and French laws all deny the power of the putative father over the illegitimate child; this principle being likewise transferred to Louisiana and other States, once under the civil law; though, in Texas at least, the putative father is allowed the guardianship of such child after the mother's death.[2] In some States, we may add, the superior rights of the mother in binding out her illegitimate child are favorably regarded.[3]

§ 279. **Maintenance of Illegitimate Children.**—The common-law rule, in absence of statutes, is that the putative father is under no legal liability to support his illegitimate offspring. But upon the strength of the natural or moral obligation arising out of the relation of the putative father to his child, an action at common law lies for its maintenance and support upon an express promise; and where one admits himself to be the father and adopts the child, while such adoption continues, a promise may be implied in favor of the party providing for it. He may renounce the adoption, and terminate this implied assumpsit, in which case there is no remedy to be pursued, unless under a statute. The father can only be charged then upon his contract.[4] But upon his promise to third persons, he may be held liable; and a promise by the putative father to pay the stepfather for the child's support, past and future, if he will continue to support it, is binding.[5]

[1] Commonwealth *v.* Fee, 6 S. & R. 255.

[2] Acosta *v.* Robin, 19 Martin, 387; Barela *v.* Roberts, 34 Tex. 554.

Alfred *v.* McKay, 36 Ga. 440; McGunigal *v.* Mong, 5 Penn. St. 269; Pratt *v* Nitz, 48 Iowa, 33. But a putative father who has paid a judgment against himself for breach of a bond to the town for the child's support, and has received the child with authority from the selectmen, has a right to the child's control and custody. Adams *v.* Adams, 50 Vt. 158. As to the guardian's right of custody to an illegitimate orphan child, see Johns *v.* Emmert, 62 Ind. 533. And where the child has been abandoned and apprenticed out by an asylum, see Copeland *v.* State, 60 Ind. 394.

[4] Hesketh *v.* Gowing, 5 Esp. 131; Nichols *v.* Allen, 3 Car. & P. 36; Furrillio *v.* Crowther, 7 Dowl. & Ry. 612; Cameron *v.* Baker, 1 Car. & P. 258; Moncrief *v.* Ely, 19 Wend. 405. Claims for maintenance upon the estate of a second putative father are not favored, where no express and binding contract to support can be established, nor are verbal declarations readily available to show such a contract. Duncan *v.* Pope, 47 Ga. 445; Nine *v.* Starr, 8 Oreg. 49; Dalton *v.* Halpin, 27 La. Ann. 382.

[5] Wiggins *v.* Keizer, 6 Ind. 252.

But the statutes which relate to the maintenance of bastard children, supply the want of adequate common-law remedies; the main element in such legislation being public indemnity against the support of such persons. Under the old poor-laws of England, the mother had a compulsory remedy against the putative father; but this was taken away by the act of 4 & 5 Will. IV. c. 76. By the statute of 7 & 8 Vict. c. 101, however, the mother is afforded relief once more, and the father may be summoned before the petty sessions and ordered to pay a weekly sum for the child's maintenance, and the costs of obtaining the order; maintenance to last until the child is thirteen years of age. The money is to be paid to the mother, and may be recovered by distress and imprisonment.[1] The provisions of law in force in most of the United States are borrowed from the older English statutes, and our courts are very generally invested with plenary jurisdiction over such matters; and at the instance of the mother the father may be coerced by arrest and imprisonment, if need be, into giving bonds and furnishing maintenance for his illegitimate child; thus relieving the mother to some extent of the burden to which his criminal misconduct has chiefly contributed, and indemnifying the public against the support of the penniless and unfortunate.[2]

Past seduction has been held sufficient to support a deed. There is an old English case, where equity compelled the specific performance of a deed-poll, made by a man who had seduced a woman and had a child by her; the writing prom-

[1] And see 2 & 3 Vict. c. 85; 8 & 9 Vict. c. 101. The order may be obtained by a married woman, mother of the bastard. Regina *v.* Collingwood, 12 Q. B. 681. And see Follit *v.* Koetzow, 24 Jur. 651. In case of death or incapacity of the mother, so that the child becomes chargeable to the parish, the order may be enforced by the guardians or overseers of the parish.

[2] 2 Kent Com. 215, and cases cited; State *v.* Beatty, 66 N. C. 648; Musser *v.* Stewart, 21 Ohio St. 353; Marlett *v.* Wilson, 30 Ind. 240; Barber *v.* State, 24 Md. 383; Wheelwright *v.* Greer, 10 Allen, 389. See Bishop and other writers on statutory crimes. In some States certain persons are authorized to make complaint against the father for maintenance of the bastard, where the mother refuses or neglects to do so. *Ib.* The main purpose of these bastard acts is to indemnify the public against support of the child, and they appear to be in the nature of civil proceedings.

ising to pay £2,000 after his death for the purchase of an annuity for the mother and her child for their lives. Both the man and the child had died before the suit was brought.[1] In Pennsylvania, the same principle is pushed even farther; for it is ruled that seduction of a female and begetting a bastard is sufficient consideration to support a man's promise to give bonds for a sum of money.[2] But there must be nothing oppressive or unfair in such transactions, and if the promise be solely in consideration of stopping a criminal prosecution, it is void.[3] Nor ought agreements as to the wages of sin to be favored.[4]

Whatever may be the mother's legal responsibility for the maintenance of her bastard child while she lives, it appears that an action cannot be maintained against the administrator of her estate for the child's maintenance subsequently to her death.[5]

§ 280. **Persons in Loco Parentis; Distant Relatives, &c.** — A person standing *in loco parentis* may sue *per quod servitium* for the abduction of his daughter's illegitimate child.[6] But a parent is not bound to support the illegitimate offspring of his children.[7] Relatives more distant than parents do not, on the whole, seem to have much consideration in matters of this sort; and it is even possible that the assumption of a family name by an illegitimate member is a grievance for which the offended relatives have no redress.[8]

§ 281. **Bequests to Illegitimate Children.** — Bequests to ille-

[1] Marchioness of Annandale *v.* Harris, 2 P. Wms. 433. And see Turner *v.* Vaughan, 2 Wils. 339.

[2] Shenk *v.* Mingle, 13 S. & R. 29. And see Phillippi *v.* Commonwealth, 18 Penn. St. 116; Knye *v.* Moore, 1 Sim. & Stu. 161. The undertaking of a putative father to pay the mother money for the support of the child is not illegal. Hook *v.* Pratt, 78 N. Y. 371. A negotiable bill might thus be given. *Ib.*

A mother may sue for injuries done her, notwithstanding a bastardy act. Sutfin *v.* People, 43 Mich. 37.

[3] *Ib.* But see Merritt *v.* Fleming, 42 Ala. 234.

[4] See Binnington *v.* Wallis, 4 B. & Ald. 650.

[5] Ruttinger *v.* Temple, 4 B. & S. 491. And see *supra*, § 278; Druet *v.* Druet, 26 La. Ann. 323.

[6] Moritz *v.* Garnhart, 7 Watts, 302.

[7] Hillsborough *v.* Deering, 4 N. H. 86.

[8] Du Boulay *v.* Du Boulay, L. R. 2 P. C. 430. See Vane *v.* Vane, L. R. 8 Ch. 383.

gitimate children, since they are not considered as relatives, are not favored in English law. There have been, it is true, certain *dicta* to the contrary; but Lord Eldon was of the opinion that there must be something to show that the testator put himself *in loco parentis;* and it has since been decided that an illegitimate child is not merely, as such, within the rule, for he is "a stranger to the testator."[1] On the ground of uncertainty in the person, a bequest to an unborn legitimate child was long considered objectionable; but Lord Eldon and others maintained that legacies given to the unborn illegitimate child of a particular woman then pregnant would be good, because the uncertainty of description could here be obviated.[2] But it is now well settled in England that a devise or bequest in favor of other future illegitimate children is void.[3]

Illegitimate children may undoubtedly take by purchase as persons designated, if sufficiently described.[4] The question in cases of this sort is really one of intention. *Prima facie*, the term "children" in a will, however, is intended to mean legitimate children; and if there are legitimate children, or if it be possible that there should be legitimate children of the person named, the English rule is that no illegitimate child can take under the description of children.[5] Yet, if they have acquired the reputation of being the children of a particular person, they are capable of taking under the description of "children," or "daughters."[6] In *Medworth* v.

[1] Lowndes *v.* Lowndes, 15 Ves. 304; Perry *v.* Whitehead, 6 Ves. 547; *contra*, per Lord Alvanley, Cricket *v.* Dolby, 3 Ves. 30; Macphers. Inf. 238.

[2] Macphers. Inf. 570, and cases cited; Gordon *v.* Gordon, 1 Mer. 141; Dawson *v.* Dawson, 6 Madd. 292.

[3] Beachcroft *v.* Beachcroft, 1 Madd. 430; Knye *v.* Moore, 1 Sim. & Stu. 61; Wilkinson *v.* Wilkinson, 1 You. & Coll. 657; Medworth *v.* Pope, 27 Beav. 71.

[4] Blodwell *v.* Edwards, Cro. Eliz. 509; Co. Litt. 36; Peachey Mar. Settl. 885, *n.*; Clifton *v.* Goodhun, L. R. 6 Eq. 278; Crook *v.* Hill, L. R. 6 Ch. 311.

[5] Gill *v.* Shelley, 2 Russ. & My. 336; *In re* Wells's Estate, L. R. 6 Eq. 599; Paul *v.* Children, L. R. 12 Eq. 16; Dorin *v.* Dorin, L. R. 7 H. L. 568.

[6] Peachey Mar. Settl. 885, *n.*, and cases cited; Evans *v.* Davies, 7 Hare, 501; Owen *v.* Bryant, 2 De G., M. & G. 697; Hartley *v.* Tribber, 16 Beav. 510; Leigh *v.* Byron, 1 Sm. & Gif. 486; Tugwell *v.* Scott, 24 Beav. 141; Worts *v.* Cubitt, 19 Beav. 421. And see Williamson *v.* Codrington, 1 Ves. Sen. 511. Where legitimate children alone answer to the description intended, or are sufficiently designated, they will take

Pope, the rule was concisely stated to be, that an illegitimate child *in esse* or *en ventre sa mère* may, if properly described, take the benefit of a devise or bequest, and the court will not inquire as to his parentage or origin ; but that in respect of future illegitimate children, the law will not let them take under any description whatever. "The reason why the English law so holds is, that it considers such a provision for future illegitimate children as *contra bonos mores*." [1]

In this country, the tendency seems to be so far favorable to illegitimate children as to regard wills made in their favor with the same, or nearly the same, consideration as all others. And our courts regard bastards as having strong claims to equitable protection, notwithstanding the criminal indulgence of their parents. In several important cases, specific performance of voluntary settlements made by the father in their favor have been decreed.[2] And a devise, in specific terms, to an unborn natural child of a woman then pregnant, is sustained here as in England.[3] But whether our tribunals would sanction a bequest to other unborn illegitimate children may admit of doubt; provided such child were never legitimated by subsequent marriage. For, after all, there must be some discrimination made against criminal intercourse.

under the will. Hill *v.* Crook, L. R. 6 H. L. 265. But the ultimate right of the crown in case of illegitimacy cannot be evaded by the terms of a trust. *Re* Wilcock's Settlement, L. R. 1 Ch. D. 229.

[1] Per M. R., in Medworth *v.* Pope, 27 Beav. 71. A child *en ventre sa mère* at date of the will, though not born until after testator's death, may take a bequest. Crook *v.* Hill, 3 Ch. D. 773. And see L. R. 6 H. L. 265. Further important illustrations of the equity doctrine may be seen in the recent cases of Lambe *v.* Eames, L. R. 6 Ch. 597 ; Holt *v.* Sindrey, L. R. 7 Eq. 170 ; Savage *v.* Robertson, L. R. 7 Eq. 176. And as to the application of 27 Eliz. c. 4, to marriage settlements for bastards, see Clarke *v.* Wright, 6 Hurl. & Nor. 849. As to legacies and devises, see Beachcroft *v.* Beachcroft, 1 Madd. 430, and cases cited ; Durrant *v.* Friend, 11 E. L. & Eq. 2; Owen *v.* Bryant, 13 E. L. & Eq. 217; 4 Kent Com. 414 ; Bagley *v.* Mollard, 1 Russ. & My. 581.

[2] Gardner *v.* Heyer, 2 Paige, 11; Bunn *v.* Winthrop, 1 Johns. Ch. 338; Harten *v.* Gibson, 4 Desaus. 139; 2 Kent Com. 216 ; Shearman *v.* Angel, Bail. Eq. 351 ; Collins *v.* Hoxie, 9 Paige, 88.

[3] Knye *v.* Moore, 5 Harr. & Johns. 10. As to legacies and devises to illegitimate children under American laws, see 4 Kent Com. 413, 414, and cases cited ; Hughes *v.* Knowlton, 37 Conn. 429.

§ 282. **Guardianship of an Illegitimate Child.** — Testamentary guardianship, of which we are to speak in another connection, is of such a nature that a father cannot by his will appoint a guardian for his illegitimate children.[1]

[1] Sleeman *v.* Wilson, L. R. 13 Eq. 36. Guardians are of course appointed on occasion for illegitimate minors, as for instance in case such a child has a legacy. Johns *v.* Emmett, 62 Ind. 533.

PART IV.

GUARDIAN AND WARD.

CHAPTER I.

OF GUARDIANS IN GENERAL; THE SEVERAL KINDS.

§ 283. **Guardianship Defined; Applied to Person and Estate.** — The guardian is a person entrusted by law with the interests of another, whose youth, inexperience, mental weakness, and feebleness of will disqualify him from acting for himself in the ordinary affairs of life, and who is hence known as the *ward*.

Guardianship usually applies to minor children; and in this sense the guardian may be either their natural protector, whose authority is founded upon universal law, or some person duly chosen to act on their behalf. Thus, the father (and sometimes the mother) exercises the right of custody and nurture as the child's natural guardian; while, if the parents are dead, some one must be selected to supply their place. And since the parental control does not extend to the estate of a minor, the appointment of a guardian may be both necessary and proper, when property becomes vested in a child under age. Guardianship applies also at the present day to idiots, lunatics, spendthrifts, and the like; and the guardian of such person derives his authority from statute law and a special appointment. This guardian is sometimes designated as the *committee*.

The law of guardianship is most naturally divided into guardianship of the person, and guardianship of the estate. Guardianship of the person is a relation essentially the same as that of parent and child, though not without some impor-

tant differences, as we shall see hereafter. Hence the guardian has been called "a temporary parent."[1] Guardianship of the estate bears a closer resemblance to trusteeship; guardians and trustees being alike bound to manage estates with fidelity and care, under the supervision and direction of the chancery courts. The same person is often guardian of both the person and estate of the ward; but not necessarily, for these may be kept distinct. So, too, there may be joint guardians, as in other trusts.

§ 284. **Classification of Minors in England; Obsolete Species.** — The law of guardianship, in England, is one of irregular growth. Guardians, until chancery jurisprudence became fully developed, were recognized only for certain limited purposes. Their powers were restricted, and new classes were created from time to time, as the exigency arose. One species of guardianship would fall into disuse and another spring up in its place. Hence it is found difficult to attempt a classification, or reduce the general authority of guardians to a definite system. A recent English text-writer enumerates no less than eleven different kinds of guardians, many of which are obsolete, and others of merely local application.[2] Among them may be mentioned *guardianship in chivalry*, an incident of the feudal tenure, more in the nature of a hardship than a privilege, so far as the ward was concerned, which was finally abolished in the time of Charles II.; *guardianship by special custom*, which was confined to London and certain other localities, and appears to exist no longer; *guardianship by appointment of the spiritual courts*, traces of which still exist in the appointment of administrators *durante minore ætate; guardianship by prerogative*, applicable only to the royal family; and *guardianship by election of the infant*, which appears to us more properly considered at this day in connection with the appointment of chancery guardians. But *guardianship by nature and nurture*, *guardianship in socage*,

[1] Bl. Com. 460; 2 Kent Com. 220.

[2] Macphers. Inf. 2 *et seq.*, to which the reader is referred for a full account of these kinds of guardianship, including guardianship under Stat. 4 & 5 P. & M. c. 8, alluded to in 1 Bl. Com. 461, and repealed by 9 Geo. IV. c. 31. See also 1 Bl. Com. 461, and Harg. notes.

testamentary guardianship, and *chancery guardianship*, require special consideration, and these will be taken up in order.

§ 285. **English Doctrine; Guardianship by Nature and Nurture.** — Guardianship by nature and nurture denotes hardly more or less than the natural right of parents to the care and custody of their children. It has been usual to treat of guardians by nature as distinct from guardians by nurture; but in reality the latter constitute, for practical purposes, only a species of the former. Mr. Macpherson considers them together, and doubts whether guardianship by nature, as known in the old law, has existed since the time of Charles II., when feudal tenures were abolished; for it appears to have originated in the practice of selling the marriage of the heir.[1]

Guardianship by nature and nurture belongs exclusively to the parents: first, to the father, and, on his death, to the mother. The father's right was formerly preferred to the mother's in all cases, while the modern tendency is otherwise. The office of natural guardian lasted during the minority of the child; but guardianship by nurture ceased when he attained the age of fourteen. So guardianship by nature applied to the heir apparent or presumptive, and guardianship by nurture to the other children. Guardianship by nature was something higher than guardianship by nurture.[2] But it is, nevertheless, clear that the father has a right, recognized by general law, to the custody of all his children, not only during the period of nurture, but until the age of majority. So, too, the mother, if not superseded by the infant's election at fourteen, or by the appointment of a new guardian, has, in the absence of the father, the legitimate care of the child for the same period.[3]

The authority of such guardians extends only to the ward's person. They have no right to intermeddle with his property.[4] Blackstone says that, if an estate be left to an infant,

[1] Macphers. Inf 52, 58. See also 1 Bl. Com. 461, and Harg. notes 1 & 3; 2 Kent Com. 220, 221.

[2] 1 Bl. Com. 461, and Harg. notes; 2 Kent Com. 220, 221.

[3] Macphers. Inf. 61, 65; *supra*, §§ 245, 252.

[4] 1 Bl. Com. 461, and Harg. notes; 2 Kent Com. 220, 221; Hyde *v.* Stone, 7 Wend. 354; Kline *v.* Beebe, 6 Conn.

the father is, by common law, the guardian, and must account to his child for the profits. But this is only because the law holds him and all others responsible as a *quasi* guardian; and it is well settled at the present day, that if a child becomes vested with property during his father's lifetime, there is no one strictly authorized to take it until a guardian has been duly appointed.

Guardianship by nature and nurture is inferior to guardianship in socage; and it yields to every kind of guardianship which exists by strict appointment, so far as the ward's property is concerned, though not necessarily as to his person.

§ 286. **English Doctrine; Guardianship in Socage.** — Guardianship in socage arises, at common law, whenever an infant under fourteen acquires title to real estate; the chief object of the trust being the protection of such property and the instruction of the young heir in the pursuit of agriculture.[1] It applies only when the infant has land by descent, and cannot exist if his estate be merely personal. His title, too, must be *legal* and not merely *equitable;* hence it would seem that there cannot be a guardian in socage where the interest of the ward is only reversionary.[2] This species of guardianship was anciently assignable, so far at least as the custody of the infant was concerned; but by the doctrine and practice of later times it became regarded as a strictly personal trust, neither transmissible by succession, nor devisable, nor assignable.[3]

The duty of the guardian in socage is to take possession of the heir's person and real estate, to receive the rents and profits until the heir reaches the age of fourteen, to keep his evidences of title safely, and to bring him up well.[4] His powers are commensurate with his duties. He acquires by virtue of his office an actual estate in the ward's land, though not to his own use;[5] he may gain a settlement by actual res-

494; Fonda *v.* Van Horne, 15 Wend. 631.

[1] 1 Bl. Com. 461, and Harg. *n.*; 2 Kent Com. 220; Dagley *v.* Tolferry, 1 P. Wms. 285.

[2] Macphers. Inf. 19; 2 Bl. Com. 88.

[3] Macphers. Inf. 20 *et seq.*; 2 Bl. Com. 461, and Harg. *n.*; 2 Kent Com. 223.

[4] Co. Litt. 89; Macphers. Inf. 28.

[5] Plowd. ch. 293; Macphers. Inf. 28; Rex *v.* Sutton, 3 Ad. & El. 597.

idence upon it;[1] and he can grant leases terminable, and perhaps even void, when the ward reaches the age of fourteen.[2] A guardian in socage cannot be removed from office, but the ward may supersede him, at this age, by a guardian of his own choice.[3]

Guardianship in socage has been said to extend to the heir's personal property; but there is insufficient legal authority for such a supposition, though it is likely that the farm-stock and household chattels of the ward were included; and when this guardianship was common, personal property consisted of little else.[4]

One peculiarity of this guardianship was, that the trust belonged only to such next of blood to the child as could not possibly inherit, and it devolved upon him without appointment; the common law, with a characteristic distrust of human nature, deeming it imprudent to confide the child's interests to one who expected the succession. For, as Fortescue and Sir Edward Coke affirmed, to commit the custody of the infant to such a person, was like giving up a lamb to a wolf to be devoured.[5] Guardianship in socage has passed into disuse, though it cannot be said to have been actually abolished.

§ 287. **English Doctrine; Testamentary Guardianship.** — Testamentary guardianship was instituted by the statute of 12 Car. II. c. 24, and for this reason testamentary guardians are sometimes called *statute* guardians.[6] This statute provided that any father, whether an infant or of full age, might, by deed executed in his lifetime, or by his last will and testament, dispose of the custody and tuition of his child, either born or unborn, to any person or persons in possession or remainder, other than popish recusants; such custody to last till the child attained the age of twenty-one, or for any less period, and to comprehend, meantime, the entire manage-

[1] Rex *v.* Oakley, 10 East, 491; Macphers. Inf. 28.

[2] Bac. Abr. Leases, i. 9; 1 Ld. Raym. 131; Rex *v.* Sutton, 5 Nev. & M. 353; Macphers. Inf. 35, 36.

[3] Co. Litt. 89 *a*; Macphers. Inf. 41.

[4] Macphers. Inf. 31; Bedell *v.* Constable, Vaugh. 185. But see Harg. *n.* 67 to Co. Litt. 89.

[5] Co. Litt. 88 *b*; 1 Bl. Com. 462.

[6] 1 Bl. Com. 462.

ment of his estate, both real and personal. So far as popish recusants are concerned, this statute has since been modified; and all religious disabilities as to the office are now removed;[1] and since the statute of 1 Vict. c. 26, an infant, though the father, cannot exercise the right of testamentary appointment; otherwise, the statute remains in force. Under this English law it matters not what are the father's religious opinions.[2] But a mother cannot appoint, nor a putative father, nor a person *in loco parentis*.[3]

The important question, arises, under this statute, whether the words "by deed executed in his lifetime" permits the father to dispose of his children by any instrument not testamentary he may see fit to make. Lord Eldon was of the opinion that he could not, but was confined to a testamentary instrument in the form of a deed, which cannot operate during life and may be revoked at pleasure.[4] Such is doubtless the English law at the present day.[5]

Testamentary guardianship gives the custody of the ward's person, and of all his real and personal estate; and it embraces not only such property as comes to the ward through descent, devise, bequest, or inheritance from the father, but all that he may acquire from any person whomsoever, and whether real or personal. This shows that the guardian's interest is derived not from the father, but from the law itself, for the father could give him no interest over that which was never his own.[6]

Besides having the advantage of full control over the ward's entire estate, the testamentary guardian stands better than the guardian in socage, inasmuch as his power lasts until the ward reaches his majority, unless the father has seen fit to limit his trust to a less period.

Testamentary guardianship, as now understood, was un-

[1] 31 Geo. III. c. 32; 4 Mont. & C. 687; Corbet *v.* Tottenham, 1 Ball & B. 59.

[2] Villareal *v.* Mellish, 2 Swanst. 538.

[3] Macphers. Inf. 83; 1 Bl. Com. 462, Harg. *n.*; Vaugh. 180; 3 Atk. 519; *supra*, §§ 245, 283.

[4] *Ex parte* Earl of Ilchester, 7 Ves. 367; Earl of Shaftesbury *v.* Lady Hannam, Finch Rep. 323.

[5] Macpherson intimates a different opinion. See Macphers. Inf. 84; Lecone *v.* Sheires, 1 Vern. 442.

[6] Macphers. Inf. 91. See also Gilliat *v.* Gilliat, 3 Phillim. 222.

known to the common law. Lord Alvanley said, in *Ex parte Ilchester:* "It is clear, by the common law, a man could not, by any testamentary disposition, affect either his land or the guardianship of his children. The latter appears never to have been made the subject of testamentary disposition till the statute 12 Charles II."[1] But it seems probable, from some expressions of Lord Coke, that, so far as the custody of the ward's person was concerned, though not as to his lands, testamentary dispositions were not unknown to the old common law, and that this testamentary guardian, sometimes confounded with the guardian for nurture, had the care of the child until he reached the age of fourteen, with power to dispose of his chattels.[2]

§ 288. **English Doctrine; Chancery Guardianship.** — Guardians by appointment of a court of equity, or *chancery guardians*, as they are termed, have, within the last century, assumed such importance, as almost to supersede, in the English practice, the other kinds, except perhaps the testamentary guardian. The earliest known instance of such an appointment occurred in 1696.[3] Blackstone speaks of the practice in his day as applicable chiefly to guardians with large estates, who sought to indemnify themselves and to avoid disagreeable contests with their wards, by placing themselves under the direction of the Court of Chancery.[4] The origin of this guardianship is obscure. Mr. Hargrave considered it an act of usurpation by the Lord Chancellor, but admitted the jurisdiction to have been fully established in his time.[5] Fonblanque warmly controverts the charge of usurpation, claiming that the jurisdiction exercised by the Court of Chancery over infants flows from its general authority, as delegated by the crown.[6] This latter view has met with the best judicial approval; for, as Lord Hardwicke and others have expressed it, the State must place somewhere a superintending power over those who cannot take care of themselves: and hence chancery necessarily

[1] 7 Ves. 370.

[2] Co. Lit. 87 *b*; Co. Cop. § 23; Macphers. Inf. 68.

[3] Case of Hampden. See Co. Litt. 88 *b*, Harg. *n.*

[4] 1 Bl. Com. 463.

[5] Co. Litt. 89 *a*, Harg. *n.* 70.

[6] 2 Fonb. Eq. 228, *n.*, 5th ed.; 2 Story Eq. Juris. § 1333.

acts, representing the sovereign as *parens patriæ*.[1] From the peculiar nature and restrictions of the other kinds of guardianship, many orphans, whose fathers had failed to appoint a testamentary guardian for them, would be otherwise without protection either of person or property. Whatever may be the origin of the jurisdiction by virtue of which courts of chancery appoint guardians in such cases, the right of making such appointments, and in general of controlling the persons and estates of minors, has long been firmly established, and cannot at this day be shaken.

An infant is constituted a ward in chancery whenever any one brings him in as party plaintiff or defendant, by a bill asking the directions of the court concerning his person or estate, or the administration of property in which he is interested.[2] In this character he is treated as under its special protection. Again, a petition may be presented for the appointment of a chancery guardian, alleging that the infant has estate, real or personal. But the mere appointment of a guardian, in this instance, will not make him a ward in chancery.[3] Where a suit is pending, the court appoints a guardian of *the person* only; in other cases a guardian of *the person and estate*.[4] So chancery will appoint a guardian on petition, where testamentary guardians decline to act; and, if necessary, determine on petition the right of a guardian already appointed.[5]

As to the general jurisdiction of chancery over infants, it may be observed that in the appointment and removal of guardians, in providing suitable maintenance, in awarding custody of the person, and in superintending the management and disposition of estates, the chancery court wields large powers for the benefit of the young and helpless. This jurisdiction, being clear of technical rules and dependent upon the discretion of the Chancellor, adapts itself far more readily to the various grades of society, the intention of testators, the

[1] Butler *v.* Freeman, Ambl. 301. See Lord Thurlow, in Powell *v.* Cleaver, 2 Bro. C. C. 499; Lord Eldon, in De Manneville *v.* De Manneville, 10 Ves. 52.

[2] Macphers. Inf. 103; Ambl. 302, *n.*

[3] Macphers. Inf. 104.

[4] *Ib.* 105.

[5] *Ib.* 104.

wants and wishes of the infants themselves, and the different varieties of property, than all the other guardianships combined.[1] By compelling trust officers to give security to invest under its direction, and to keep regular accounts, the court exerts a wholesome restraint on the ward's behalf, while at the same time it arms the guardian against all attacks of a capricious heir, by affording its sanction to his official acts.

Chancery guardians are, in general, only appointed where there is property; but this is because guardianship can scarcely be necessary otherwise. Chancery, as Lord Eldon observed, cannot take on itself the maintenance of all the children in the kingdom.[2] Hence persons desiring to call in the authority of the court for the protection of an infant sometimes resort to the expedient of settling a sum of money upon him.[3] The great objection to chancery guardianship is its expense; and the lavish outlay of money which becomes requisite at every step renders the practical benefit to the minor often questionable. Less cumbrous machinery would remedy this evil. There are some English statutes relating to the poor, the employment of apprentices, and the like, which, in connection with the writ of *habeas corpus*, are designed to supersede, in a measure, the necessity of personal guardianship, for those who are without property and yet need protection.[4]

§ 289. **English Doctrine; Guardianship by Election of Infant.** — Guardianship by election of the infant deserves a passing notice. We have seen that the infant in socage had the right of choosing a guardian at the age of fourteen. This age was recognized also as the limit to guardianship for nurture; the law choosing to yield somewhat to the ward's discretion thenceforth.[5] The socage ward might therefore, if he had no testamentary guardian, choose one to act on his behalf until majority, by executing a deed for that purpose.

[1] 1 Bl. Com. 463, Harg. *n.*

[2] Wellesley *v.* Duke of Beaufort, 2 Russ. 21.

[3] Macphers. Inf. 103.

[4] 1 Bl. Com. 463, Harg. *n.*, and acts there enumerated.

[5] *Supra*, § 285.

But little is really known on this subject, and the instances mentioned in the books are exceedingly rare.[1] Blackstone again, speaking of guardians for nurture, adds that, in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education.[2] The practice in the spiritual court was to permit the minor, when of suitable age, to nominate his guardian subject to its approval. This was but a limited privilege after all, though it seems to have been granted to all children between seven and twenty-one.[3] It is manifestly different from the right of election allowed the socage ward. The authority of spiritual courts to appoint a guardian of the person and estate was emphatically denied by Lord Hardwicke, and chancery afterwards took this guardianship completely into its own keeping. The infant, above the age of fourteen, is still permitted to nominate his guardian before the Court of Chancery; but his nomination does not supersede the authority of the court, whether he be a socage ward or not.[4] Guardianship by election of the infant has thus become a misnomer, for he does not absolutely elect.

§ 290. **Classification of Guardians of Minors in the United States; Nature and Nurture, Socage, and Testamentary.**— Guardianship in the United States differs considerably from guardianship in England. Here the whole subject is controlled in a great measure by local statutes. There are fewer kinds of guardians found in American practice, though some of the more important classes are recognized to a limited extent. Thus guardianship by nature and nurture, or the parental right of custody, prevails in most of the States. But as all children, male and female, inherit alike with us, guardianship by nurture is not even so clearly distinguished from guardianship by nature, as in the English practice.[5]

[1] Co. Litt. 88 *b*, Harg. *n.* 16; Macphers. Inf. 77.

[2] 1 Bl. Com. 461.

[3] Fitzgib. 164; Co. Litt. 88 *b*, Harg. *n.* 16.

[4] Co. Litt. 88 *b*, Harg. *n.* 16; Hughes *v.* Science, 3 Atk. 631; Macphers. Inf. 74, 78.

[5] 2 Kent Com. 221; Reeve Dom. Rel. 315; Macready *v.* Wilcox, 33 Conn. 321.

Guardianship in socage was never common in the United States. But traces of its existence are to be found. Thus in 1809, a guardian in socage, in New York, was permitted to bring trespass and ejectment.[1] This species of guardianship is now almost wholly superseded. In fact it could seldom have arisen, since half-blood and whole-blood relatives in this country inherit alike; so that a blood relation who cannot possibly inherit could rarely be found to assume the duties of the office.[2] A father who holds lands for life, with the remainder vested in his children, cannot be their guardian in socage.[3] And the lease of his ward's lands by any such guardian may be defeated by the appointment of another guardian, pursuant to the statute, who elects to avoid it.[4]

We have testamentary guardians, with essentially the same powers and duties as in England. The statute of 12 Charles II. has been enacted in most of the United States, with the language somewhat changed. No religious disabilities are imposed in our law. But while some States follow the words of the ancient statute as to minor fathers, the right is elsewhere restricted to such as are competent to make a will; and this is a preferable expression. For precise modifications the student should consult the laws of his own State. Some statutes use the words "deed or will." The Ohio statute drops the word "deed" altogether. And not uncommonly is it found in America that testamentary guardians can only be appointed by a will executed with the usual solemnities.[5]

The right of testamentary appointment is still confined to the father in most States. But an Illinois statute permits the mother, if not remarried, to appoint such a guardian, provided no appointment was previously made by the father.

[1] Byrne *v.* Van Hoesen, 5 Johns. 66. See also Jackson *v.* De Walts, 7 Johns. 157.

[2] 2 Kent Com. 222, 223; Reeve Dom. Rel. 315, 316.

[3] Graham *v.* Houghtalin, 1 Vroom, 552.

[4] Emerson *v.* Spicer, 46 N. Y. 594.

[5] See 2 Kent Com. 225, 226; Hoyt *v.* Hellen, 2 Edw. Ch. 202; Matter of Pierce, 12 How. Pr. 532; Vanartsdalen *v.* Vanartsdalen, 14 Penn. St. 384; Wardwell *v.* Wardwell, 9 Allen, 518. In New York the father's right to appoint a testamentary guardian is derived exclusively from the local statute. Thomson *v.* Thomson, 55 How. (N. Y.) Pr. 494. A mother has no power to appoint unless the statute is explicit. *Ex parte* Bell, 2 Tenn. Ch. 27.

In New York, the consent of the mother, if living, was lately required to a testamentary appointment by the father;[1] a provision afterwards repealed.[2] So, too, the English principle prevails, that the testator can appoint a guardian over his own children only; the right extending, however, to posthumous offspring. He cannot appoint guardians for other children, though he give them his property.[3] But where a statute provides that a child may be adopted by one with the same rights as if the offspring were his own, it seems just that the father, thus constituted, should have the right of appointing a testamentary guardian for his adopted child, just the same as for other children.[4] A grandfather has no right to appoint a testamentary guardian.[5]

§ 291. **American Doctrine; Chancery and Probate Guardianship.** — Chancery guardianship may be considered as adopted to some extent in this country. The supreme courts in many States have now full chancery powers, as in England, over the persons and estates of infants; they may order investments, decree care and custody of the person, take children under their protection as wards of the court in certain cases, regulate the conduct of guardians, and otherwise exercise the important functions which vest in the English equity courts. But English chancery jurisprudence is one thing, and that of the United States another. While in one country the appointment, removal, and general supervision of guardians belong immediately to the equity courts, in the

[1] N. Y. Stat. 1862, c. 172. And see Sackett's Estate, 1 Tuck. (N. Y. Surr.) 84

[2] Stat. 1871, construed in Fitzgerald *v.* Fitzgerald, 31 N. Y. Supr. 370.

[3] Brigham *v.* Wheeler, 8 Met. 127; 2 Kent Com. 225.

[4] As to divorced parents, the question of testamentary guardianship is presented under a new aspect. Where a mother is allowed by statute or otherwise to dispose of the guardianship of her minor child, by will, she is assumed to have been the survivor of her husband. A divorced wife, invested with the custody of the minor child by order of court, has presumably, as such, no such right to appoint, especially if divorced for her fault. McKinney *v.* Noble, 37 Tex. 731. Divorce, it would appear, does not take away the father's power to appoint a testamentary guardian. See Hill *v.* Hill, 49 Md. 450, where custody of the child was given to the father with a right of access to the mother.

[5] Fullerton *v.* Jackson, 5 Johns. Ch. 278; *Ex parte* Bell, 2 Tenn. Ch. 327. See further, as to the appointment of testamentary guardians, c. 2, *post*.

other a special tribunal is usually created by local statute for such matters. It is this special tribunal — somewhat resembling the English ecclesiastical court — which alone issues letters of guardianship, revokes them, and superintends trust accounts in the first instance. The guardians thus chosen have, in general, the rights and duties of chancery guardians of the person and estate.

The propriety of distinguishing between chancery guardians and those appointed by the special courts of this country — whether known as the probate, orphans', ordinary's, or surrogate's court — is obvious when the origin of our probate jurisdiction is considered. At the time America was colonized, chancery guardianship was unknown in England. The ecclesiastical or spiritual courts, independent of all temporal authority, controlled the estates of orphans and their deceased parents. The necessity of some tribunal with probate jurisdiction was soon apparent to our ancestors; but, rejecting the idea of a church establishment, they distributed probate and equity powers among the common-law courts. Their judicial system was at first simple: that of local county courts with a supreme tribunal of appeal. With the growth of population came a division of these powers in the inferior courts. New county tribunals were erected for business appertaining to estates of the dead, testamentary trusts, and the care of orphans; a blending, as it were, of ecclesiastical and equity functions. The old county courts were left to their common-law jurisdiction, while the supreme tribunal retained control over them all, exercising appellate powers in common law, equity, and ecclesiastical suits. Such, in a word, is the general origin of guardianship by judicial appointment in this country.[1] While the English chancery court was slowly extending its rights over the persons and estates of infants, another system was in process of growth on this side of the water, borrowing from English law as occasion offered, and adapting itself to the increasing wants of our own community. This system, fostered doubtless by a strong prejudice against chancery practice, with its expensive-

[1] See Smith (Mass.) Prob. Pract. 1–5.

ness and prolixity of pleadings, a prejudice widely prevalent during the last century, especially in New England, spread gradually into the new States and Territories, the creature of statute law wherever it went.

Much confusion has arisen in our courts wherever this distinction has not been kept in view. The law of guardianship is often discussed as though we inherited the English chancery system, when in truth our usual practice is without its counterpart abroad. The only American text-writers of authority on this subject, Reeve and Kent, have contributed to this perplexity. The former was not precise in his classification.[1] The latter unwisely confused American and English appointments, applying the term *chancery guardians* to both.[2] But the courts have sometimes perceived the necessity of a separate name for guardians appointed by courts of probate jurisdiction. Accordingly, they have been called *guardians of the person and estate;*[3] but this name is quite as appropriate to others. So, too, they are designated as *statute guardians;* but there are statute modifications applied to all kinds of guardians, and besides, this name was long ago bestowed by English writers upon *testamentary guardians*.[4] We shall apply, then, in these pages for want of something better, the distinguishing term *probate guardians;* this being sufficiently precise and suggestive; though it is admitted that the appointing power is not lodged in tribunals styled probate courts in every State, nor necessarily separated from courts exercising common-law functions.

§ 292. **Guardianship by the Civil Law.** — By the civil law, minority was divided into two distinct periods; the first lasting until the age of puberty, fourteen in males, and twelve in females; the second continuing from that time until majority. During the first period, the guardian was called *tutor*, and the children *pupils*. During the second period, the guardian was called *curator*, and the children *minors:* the *curator* being appointed with special reference to the management of prop-

[1] Reeve Dom. Rel. 311.
[2] 2 Kent Com. 226.
[3] See Arthur's Appeal, 1 Grant (Penn.), 55.
[4] See *supra*, § 287.

erty.[1] The same general divisions are to be found in the law of continental Europe at the present day, though modified somewhat by custom; also in Scotland;[2] also in Louisiana, and other parts of this country, which were formerly under French and Spanish dominion. But the term *curator* is in some codes applied to the guardian of the estate of the ward as distinguished from the guardian of the person.[3] So the civil law recognized three kinds of guardianship: *tutela testamentaria*, conferred by testament; *legitima*, by the law itself; *dativa*, by the authority of the judge.[4] These divisions have their corresponding analogies in English and American law; since we may place testamentary guardians in the first class, socage and natural guardians in the second, and chancery and probate guardians in the third.

§ 293. **Guardians of Idiots, Lunatics, Spendthrifts, &c.** — The different kinds of guardianship for minors having been considered, we proceed to speak briefly of guardians for idiots, lunatics, and spendthrifts, though this subject comes hardly within our scope. Under the king's sign-manual, the Lord Chancellor was invested with jurisdiction over the persons and estates of insane persons. For this reason did chancery claim authority; not by virtue of the king's prerogative as *parens patriæ;* for idiots and lunatics, it is said, were not under the protection of the sovereign until the time of Edward II.[5] Lunatic asylums are provided by law, and regulated from time to time. For legally determining the question of insanity in any case, chancery grants a commission in the nature of a writ, directed to masters in lunacy; and if the subject be found *non compos*, the court commits his person, together with a suitable allowance for his maintenance, to some person who is then called his committee.[6] Blackstone states that the rule in his day was to refuse this guardianship to the lunatic's next of kin, "because it is his

[1] Story Confl. Laws, § 493; 3 Burge Col. & For. Laws, 930, 1001–1014.

[2] Fraser Guardian & Ward, 145.

[3] 2 Kent Com. 224; Duncan *v.* Crook, 49 Mo. 116.

[4] Co. Cop. § 23; Macphers. Inf. 573; 3 Burge Col. & For. Laws. 931.

[5] 2 Story Eq. Juris. §§ 1335, 1336; 1 Bl. Com. 303; 3 P. Wms. 108.

[6] 1 Bl. Com. 306. See Lunacy Regulation Act 1853, 16 & 17 Vict. c. 70.

interest that the party should die;" but this rule has long been disregarded in practice.[1] The committee manages his ward's estate, much the same as other guardians, being held to a strict account to the court of chancery, and to the ward, if he recovers, or otherwise to his personal representatives after his death. There are receivers appointed, with a salary, in case others refuse to act; but such officer is considered as a committee, and gives proper security.[2] Guardians of insane persons are appointed in this country; but in general by the courts exercising jurisdiction in case of minors, which derive also their authority from local statutes.[3] The civil law likewise assigned tutors and curators to such persons.[4]

Guardianship for spendthrifts was something recognized by the civil law. Where a man, by notorious prodigality, was in danger of wasting his estate, he was looked upon as *non compos*, and committed to the care of curators or tutors by the prætor.[5] And by the laws of Solon, such persons were branded with perpetual infamy.[6] Such guardianship is, however, unknown in England, and Blackstone considered it unsuitable to the genius of a free nation.[7] It has nevertheless been introduced into several of the United States.[8] Being the creature of statute law, the rights and powers of such a guardian, and the method of appointment are strictly construed.

§ 294. **Guardians of Married Women.** — The recent statutes relating to married women in this country have rendered some special provisions necessary for their benefit. While their husbands had the full enjoyment of their property, no guardian was necessary, and the main object of these statutes seems to be to provide a suitable trustee of the estate, in case a minor or insane wife is abandoned by her husband, or he is likewise mentally unfitted for the trust. Such statutes are to be strictly construed as in derogation of the common law.[9]

[1] *Ex parte* Cockayne, 7 Ves. 591.

[2] 1 Bl. Com. 306. See *Ex parte* Warren, 10 Ves. 622.

[3] See U. S. Dig. "Idiots and Lunatics;" Shroyer *v.* Richmond, 16 Ohio St. 455; Angell *v.* Probate Court, 11 R. I. 187.

[4] 1 Bl. Com. 306.

[5] Ff. 27, 10, 6, 16.

[6] Potter Antiq. b. 1, c. 26.

[7] 1 Bl. Com. 306.

[8] See Mass. Gen. Sts. c. 109, §§ 8, 9.

[9] Smith Prob. Pract. 87; Schoul. Hus. & Wife, Appendix.

§ 295. **Special Guardians; Miscellaneous Trusts.** — Besides guardians with general powers, there are guardians created by law for special purposes. Such are guardians under the English marriage act, appointed for giving formal consent to the marriage of a minor, and guardians to release dower and homestead rights of insane married women. All such guardians derive their sole authority from statutes, and, having performed the duty prescribed, they have no further concern with the ward. Nor do they act except in default of a general guardian. There are also public officers appointed for charitable purposes on behalf of the State, sometimes known as guardians; such as guardians of the poor; but, except for this appellation, they have no connection whatever with our subject.[1] Special guardians, too, are found under some statutes, their rights and duties being merely temporary, pending some controversy over the appointment of a general guardian; just as special administrators are sometimes appointed in a case of emergency, and where the appointment of the general administrator is necessarily delayed.[2]

§ 296. **Guardian ad Litem and Next Friend.** — Finally, there is the guardian *ad litem*, who is simply a guardian for a special purpose; being one chosen to represent the ward in legal proceedings to which he is a party defendant. Where the ward is plaintiff he appears by next friend. In either instance the father's natural right is respected.[3] The powers and duties of guardians *ad litem* are similar in England and the United States.[4]

[1] See Macphers. Inf. 164; Smith Prob. Pract. 87.

[2] Campau *v.* Shaw, 15 Mich. 226; Swartwout *v.* Oaks, 52 Barb. 622; Brown *v.* Snell, 57 N. Y. 286; Bond *v.* Dillard, 50 Tex. 302. And see *In re* Fortier, 31 La. Ann. 50.

[3] See Woolf *v.* Pemberton, 6 Ch. D. 19.

[4] Macphers. Inf. 358; 2 Kent Com. 229. See Infants, *post.*

CHAPTER II.

APPOINTMENT OF GUARDIANS.

§ 297. **Appointment of Guardians over Infants in general.** — Guardians derive their authority either from the law or a special appointment. And all guardians of infants specially appointed must be appointed by the infant's parent; or by the infant himself; or by a court of competent jurisdiction.

§ 298. **Guardians under Authority of the Law.** — Guardians by nature and nurture act under authority of the law; which designates, first, the father; and, after his death, the mother. These are the only natural guardians possible.[1] It has been said that the infant's next of kin succeed to the natural guardianship when both parents are dead.[2] This cannot be correct according to the sense of the term as used at this day. The mother is considered the natural guardian of a bastard, in this country, as against its putative father;[3] though the common law regarded such children as without a natural guardian.[4] On principle, it would seem that the natural guardianship of a child is shifted to the mother when custody is awarded her because of her husband's personal unfitness. And the modern tendency is to regard both husband and wife as guardians, by nature, of their own children.[5]

Socage guardians also derived their authority from the law, and not from a special appointment.[6]

[1] Co. Litt. 88 *b*; 1 Bl. Com. 461; 2 Kent Com. 220; Macphers. Inf. 52; Jarrett *v.* State, 5 Gill & Johns. 27; Eldridge *v.* Lippincott, Coxe, 397; Fields *v.* Law, 2 Root, 320.

[2] See Reeve Dom. Rel. 315.

[3] Wright *v.* Wright, 2 Mass. 109; Hudson *v.* Hills, 8 N. H. 417; People *v.* Kling, 6 Barb. 366; Dalton *v.* State, 6 Blackf. 357.

[4] Macphers. Inf. 67; *supra*, §§ 278, 279.

[5] See *supra*, §§ 247, 248, 285; People *v.* Boice, 39 Barb. 307.

[6] 2 Kent Com. 223; see *supra*, §§ 286, 290.

§ 299. **Testamentary Guardianship, how constituted.** — Testamentary guardianship is the only recognized instance of authority derived from parental appointment. Guardians thus appointed require no further qualification; not even the probate of the will which appoints them.[1] But testamentary guardianship exists in this country chiefly by force of local statutes. And we find many modifications of the English rule; none more important than those of several States which render a probate of the will necessary before a testamentary guardian can act; while it is not unfrequently found that the appointment remains subject to the approval of the court, and requires the person appointed to qualify with or without sureties.[2]

The parol appointment of a testamentary guardian is insufficient.[3] But the instrument which designates him need not be executed with the same formality as a will; for the father, as the old statute intimates, may appoint by testamentary deed. It has been held that the appointment of guardians by a will not duly attested was made good by a codicil duly attested, written on the same paper, making certain alterations in the will, and confirming it in other respects.[4]

It is sometimes difficult to determine what language will constitute testamentary guardianship. The statute uses the words "custody and tuition" in reference to the children; and such assignment of the children as confers, expressly or by implication, a power thus extensive, ought to suffice. Thus, where a testator gives the "care and custody" of his children, further directing that the person so entrusted shall be guided by the advice of his executors, as to the children's

[1] Brigham *v.* Wheeler, 8 Met. 127; Hoyt's Case, 2 Edw. Ch. 113; *In re* Hart, 2 Con. & L. 375; Lady Chester's Case, Vent. 207. See 7 Ves. 365; Gilliat *v.* Gilliat, 3 Phillim. 222. The validity of the testamentary appointment being in dispute, a court of common law over a question of custody has directed an issue in order to establish the same. *In re* Andrews, L. R. 8 Q. B. 153.

[2] *Supra*, §§ 287, 290; *Re* Taylor, 3 Redf. N. Y. 259.

[3] Macphers. Inf. 84. See Johnstone *v.* Beattie, 10 Cl. & Fin. 42.

[4] De Bathe *v.* Lord Fingal, 16 Ves. 167. But see Marshall, C. J., in Gaines *v.* Spann, 2 Brock. 81; Wardwell *v.* Wardwell, 9 Allen, 518.

education, this is held to be a good appointment.[1] So it is held that testamentary guardianship was constituted, where a testator directed the trustees of his will to procure a suitable house for the residence of his children, who were infants, and to engage a proper person for the purpose of taking the management and care of the house and of his children during their minority; and requested his late wife's sister, if she should be alive at his decease, to take such management and care on herself.[2] And in general testamentary guardians need not be expressly designated as such; albeit, in order to constitute them by implication, the powers essential to the office must be conferred.[3]

The devise of certain property "in trust" for infants is not a devise of guardianship. Thus, it was said by Lord Vaughan that, where a testator devised land to a trustee, to be held in trust for his heir, and for his maintenance and education until he should be of age, this was no devise of the custody within the statute, for he might have done this before the statute.[4] The same may be said generally of legacies and bequests in trust.[5]

§ 300. **The Same Subject.** — Testamentary guardians, to use the statute expression, may be appointed "either in possession or remainder;" that is, successors in the guardianship may be designated. So they may be authorized to act during the full term of the infant's minority or for a less period. So the will may give authority to the surviving guardian to nominate a person in the place of his co-guardian who has died; although it appears to be a general rule that one testamentary guardian cannot appoint another, since his office is personal, and not assignable.[6] In other words, the testator is allowed a liberal discretion in his selection and in limiting authority. The paper which creates a person testa-

[1] See Corrigan *v.* Kiernan, 1 Bradf. 208.

[2] Miller *v.* Harris, 14 Sim. 540. See Mendes *v.* Mendes, 1 Ves. 89; s. c. 3 Atk. 619.

[3] Gaines *v.* Spann, 2 Brock. 81; Peyton *v.* Smith, 2 Dev. & Batt. Eq. 325; Johnstone *v.* Beattie, 10 Cl. & Fin. 42; Balch *v.* Smith, 12 N. H. 437.

[4] Bedell *v.* Constable, Vaugh. 177.

[5] Kevan *v.* Waller, 11 Leigh, 414; Dunham *v.* Hatcher, 31 Ala. 483.

[6] Goods of Parnell, L. R. 2 P. & D. 379; Macphers. Inf. 82; Vaugh. 177.

mentary guardian becomes thus the test of his official powers and responsibility. Letters of guardianship from the chancery or probate court give his appointment no additional force, unless required by statute. In fact such letters, however regarded in his dealings with strangers, are as a rule issued without jurisdiction.[1]

In a late New York case, it was held, on appeal from the surrogate, that no probate guardian could be appointed after the father's decease, where the father, being a man of indigent circumstances, had surrendered his children to a charitable institution by an instrument in writing, executed during his lifetime, and not long before his death, in presence of two witnesses, which purported to "commit and surrender" the children to the said institution pursuant to its charter. There were no testamentary expressions used, nor did the instrument appear to have been executed in contemplation of death. The decision of the court appears to rest on statutory interpretation.[2] In general, a firm cannot be made guardian of an infant; nor probably can a corporation;[3] though financial corporations are sometimes chartered at this day with express power to assume fiduciary trusts.[4]

The testator's power of appointment extends to all his lawful children surviving at his decease, being still minors and unmarried. Posthumous children are, likewise, included. And the testator's appointment of his wife as testamentary guardian is not revoked by the birth of such issue, subsequent to the execution of the will or testamentary deed

[1] Robinson *v.* Zollinger, 9 Watts, 169; Morris *v.* Harris, 15 Cal. 226; Holmes *v.* Field, 12 Ill. 424; Copp *v.* Copp, 20 N. H. 284. See Macphers. Inf. 84, 86; Stone *v.* Dorrett, 18 Tex. 700. But statutes may provide that letters of guardianship shall issue to a testamentary guardian who must first qualify. Hence a non resident alien is held incapable of serving. *Re* Taylor, 3 Redf. (N. Y.) 259. And see *post*, § 303. If the testator's will prescribes that the wife shall be testamentary guardian of the children, "as long as she shall remain his widow," her authority ceases on her remarriage, and a new appointment becomes necessary. Corrigan *v.* Kiernan, 1 Bradf. Sur. 208; Holmes *v.* Field, 12 Ill. 424.

[2] People *v.* Kearney, 31 Barb. 430.

[3] See Macphers. Inf. 109; De Mazar *v.* Pybus, 4 Ves. 644.

[4] Rice's Case, 42 Mich. 528; *Re* Cordova, 4 Redf. 66.

appointing her; the analogy of distribution of his property failing to affect this case.[1]

§ 301. **Guardianship by Appointment of Infant; Right to nominate.** — Guardianship by sole appointment of the infant cannot now be said to exist. But at the common law there was one instance where it arose; namely, when the heir above the age of fourteen chose to supersede his guardian in socage, by one of his own choice, under a deed of appointment.[2] Infants have still the privilege of nominating, though not appointing, a guardian in court, after arriving at this age; and, if judicially sanctioned, their choice is good. In the appointment of chancery guardians, the custom is for the court to approve such nomination without the usual reference to a master.[3] But this is not an invariable rule.[4] Testamentary guardians cannot be superseded in this way, nor chancery guardians.[5] Statutes giving the right of selecting probate guardians to infants above fourteen have been enacted throughout the United States; but the extent of this privilege is not uniformly prescribed.[6] Yet the ward cannot set aside a testamentary or chancery guardian in this country; nor, on principle, should he be allowed to supersede a probate guardian properly appointed, unless authorized to do so by a positive statute.[7] Having once exercised his right of choice, he is bound by the appointment, and cannot nominate again, as his fancy pleases.[8] In any event, the court must

[1] Hollingsworth's Appeal, 51 Penn. St. 518; 2 Bro. C. C. 538; Macphers. Inf. 87.

[2] *Supra*, §§ 286, 289; Co. Litt. 89 *a*.

[3] *Ex parte* Edwards, 3 Atk. 519; Macphers. Inf. 78, 109.

[4] *Ex parte* Watkins, 2 Ves. 470; Curtis *v.* Rippon, 4 Madd. 462; Coham *v.* Coham, 13 Sim. 639.

[5] Palmer, 22; Andrew, 313; Matter of Dyer, 5 Paige Ch. 534; Matter of Nicoll, 1 Johns. Ch. 25; Matter of Reynolds, 18 N. Y. Supr. 41. Nor the mother, as natural guardian. Beard *v.* Dean, 64 Ga. 258.

[6] See Ham *v.* Ham, 15 Gratt. 74; Dibble *v.* Dibble, 8 Ind. 307; Pitts *v.* Cherry, 14 Ga. 594; Arthurs' Appeal, 1 Grant, 55; Sessions *v.* Kell, 30 Miss. 458; Montgomery *v.* Smith, 3 Dana, 599; Palmer *v.* Oakley, 2 Doug. 433. The minor's choice under statute cannot be disapproved at the arbitrary discretion of the judge; but if one choice be injudicious, the minor may choose another, and upon the choice of an unobjectionable person the minor has a right to have him appointed. Adams's Appeal, 38 Conn. 304. And see next c.

[7] Dyer's Case, 5 Paige Ch. 534.

[8] Lee's Appeal, 27 Penn. St. 229. See also E. B. *v.* E. C. B., 28 Barb. 299. But see Adams's Appeal, 36 Conn. 304,

sanction the infant's selection, and issue letters before the guardian can act; so that this is guardianship by appointment rather of the court than of the infant, but not of course by judicial appointment at arbitrary discretion.

§ 302. **Chancery and Probate Guardians are Judicially Appointed.** — Chancery and probate guardians, subject to the above qualification, are created in strictness by the special appointment of a court exercising competent jurisdiction. And in discussing this subject of judicial appointment we shall consider, *first*, the tribunal which appoints; *second*, the persons properly appointed; *third*, the method of appointment; and *fourth*, the effect of the appointment.

§ 303. **The Same Subject; Jurisdiction; how obtained.** — As to the first point, it may be premised that in England all guardians are appointed by the Court of Chancery in the exercise of inferior or appellate powers. Chancery guardians have been appointed in this country, but not frequently; and county courts of probate jurisdiction at the present day generally act in the first instance, issuing letters of guardianship, as well as of administration, under their official seal. Thus, in New England and most of the Western States, probate guardians are appointed by the judge of probate; in New York, by the surrogate; in New Jersey by the orphans' court or the ordinary; in Pennsylvania and Maryland by the orphans' court; in Ohio, by the Court of Common Pleas with chancery powers; in California, by the district courts possessing a similar jurisdiction. In Virginia, North and South Carolina, the chancery and county courts have exercised a sort of concurrent jurisdiction; in others of the Southern States there are orphans' courts; in Louisiana the civil law has prevailed.[1]

Two important elements enter into this jurisdiction over the ward, — possession of property and actual residence within

showing that local statutes vary on this point.

[1] See 2 Kent Com. 226, 227, and notes; Glascott *v.* Warner, 20 Wis. 654; Herring *v.* Goodson, 43 Miss. 392 Duke *v.* State, 57 Miss. 229. For rules which prevailed in California while under Mexican rule, and the powers of alcades over guardianship, see Braly *v.* Reese, 51 Cal. 447.

the judicial limits. Property in the infant has usually been deemed essential in chancery practice.[1] But in a case which came before Lord Chancellor Cottenham, in 1847, it was held that the court should interfere on behalf of infants without property, so as to award custody of the person. "I have no doubt about the jurisdiction," was his emphatic language.[2] What may be called guardians of the person and estate in chancery are still appointed, however, on the allegation of property. In the United States, letters issue to probate guardians, whenever there is occasion for their appointment, the statute rarely prescribing narrower limits to the judge's authority; and, as our practice is simple and attended with little expense, the same necessity for inquiry into the means of the infant does not manifestly arise as in the case of chancery guardianship. But statute and practice generally have reference to cases of property.[3]

Where the ward is a non-resident, guardianship is frequently recognized for the collection and preservation of his estate in the jurisdiction; and in such cases the court where the property is situated, upon due notice, appoints some friend of the minor on his behalf, requiring proper security; the existence and *situs* of the property determining the right of jurisdiction.[4]

Far more important is the requirement of an actual residence within the jurisdiction; especially in States where the authority of courts with probate jurisdiction is strictly limited to their respective counties. Letters of guardianship in the case of a resident person obtained in the wrong county are null and void, and may be collaterally impeached in any court.[5] Where the courts of two or more counties have con-

[1] See Macphers. Inf. 103; *supra*, § 288.

[2] *In re* Spence, 2 Ph. 247.

[3] People *v.* Kearney, 31 Barb. 430.

[4] Clarke *v.* Cordis, 4 Allen, 466; Rice's Case, 42 Mich. 528. See Hope *v.* Hope, 27 E. L. & Eq. 249; *Re* Horsford, 2 Redf. 168. This jurisdiction is often conferred by statute as to personal property. *Ib.* So, too, as to real property, or to either real or personal property. Maxwell *v.* Campbell, 45 Ind. 360; Seaverns *v.* Gerke, 3 Sawyer, 353.

[5] Ware *v.* Coleman, 6 J. J. Marsh. 198; Sears *v.* Terry, 26 Conn. 273; Dorman *v.* Ogbourne, 16 Ala. 759; Munson *v.* Munson, 9 Tex. 109; Lacy *v.* Williams, 27 Mo. 280; Herring *v.* Goodson, 43 Miss. 392; Duke *v.* State, 57 Miss. 229.

current jurisdiction, as if a non-resident has property lying in different places, the general principle is that the court where proceedings are first commenced retains jurisdiction. And letters once properly issued are not revoked by the ward's removal to another county within the same general jurisdiction. Where a new appointment becomes necessary, next to the inquiry whether the party is a minor or otherwise legally subject to guardianship at all, is the determination of his actual residence. But, as just observed, property may give jurisdiction in some cases where the ward resides abroad. Nor does non-jurisdiction make everything void to the extent of relieving one from liability who has acted as guardian and received property in that capacity, since one may be a *quasi* guardian, and be estopped by his own acts.[1]

The infant's place of residence at the time when a guardian is to be appointed determines the jurisdiction of the court. Hence, the county court which appointed the first guardian of a ward may not always appoint his successor.[2] And statute jurisdiction is taken where minor orphans are in fact resident in a State at the time, even if the legal domicile be elsewhere ; the appointment giving at all events an authority to be recognized within such State.[3]

The Court of Chancery exercises a large discretion. Its authority over the persons and estates of infants, idiots, and lunatics cannot be questioned elsewhere. No tribunal short of the legislature can interpose a check upon its powers. But it is different with probate courts. Their jurisdiction is founded upon local statutes, maintained in derogation of the common law, made subject to supervision of supreme tribunals, and confined to the exercise of special powers sparingly conferred. From the fact that the English equity courts are unfettered in their authority, chancery courts in this country incline to the same direction ; hence, they construe strictly the powers of the probate courts, while maintaining their

[1] McClure *v.* Commonwealth, 80 Penn. St. 167; *post*, Part IV.

[2] Harding *v.* Weld, 128 Mass. 587; Brown *v.* Lynch, 2 Bradf. 214.

[3] Ross *v.* Southwestern R., 53 Ga. 514; *Re* Hubbard, 82 N. Y. 90. See as to domicile, *supra*, § 230, *post*, c. 5. Questions of conflicting jurisdiction will be considered, c 4, *post*.

own; a matter of little difficulty, since the supreme authority is in their hands, whether in matters of probate, equity, or common law. With especial strictness are the powers of probate tribunals scrutinized in matters which do not grow out of the settlement of estates of deceased persons.[1]

It may devolve on chancery to appoint guardians where testamentary guardians decline or are disqualified to act. So where there are two or more testamentary guardians and they fail to agree.[2] And it is the English rule that testamentary guardianship does not go over upon the guardian's death, no successor having been indicated in the will; but chancery must supply the vacancy.[3] The same may be said of the courts in this country with probate jurisdiction.[4]

It would appear to be the general rule in this country, that a probate or statute guardian cannot be appointed for a minor where the minor is not within the jurisdiction or domiciled there, and has no property therein; and moreover, that bringing an infant into the State by stratagem for the purpose of giving a colorable jurisdiction will not avail.[5]

There may be jurisdiction under statutes to appoint a guardian both on the grounds of infancy and insanity.[6]

§ 304. **Selection of Chancery or Probate Guardian.** — *Second.* In selecting the proper person as guardian, the judge is allowed to exercise a liberal discretion, and his decision will not be disturbed on appeal except for good and sufficient cause. Such is the rule both in England and America.[7] But this discretion is not an arbitrary one; it must be exercised in conformity with certain fixed principles. And if the judge appoint without giving reasonable notice, so that parties in-

[1] See, for instance, as to insane persons and spendthrifts, Holden *v.* Scanlin, 30 Vt. 177: Sears *v.* Terry, 26 Conn. 273; Strong *v.* Birchard, 5 Conn. 357; Cooper *v.* Summers, 1 Sneed, 453; Hovey *v.* Harmon, 49 Me. 269. And see, as to minors, *Re* Hosford, 2 Redf. 168.

[2] Macphers. Inf. 113; *ib.* 104.

[3] Bac. Abr. Guardian and Ward, A.

[4] See People *v.* Kearney, 31 Barb. 430; Judge of Probate *v.* Hinds, 4 N. H. 464.

[5] *Re* Hubbard, 82 N. Y. 90.

[6] King *v.* Bell, 36 Ohio St. 460. The status of an Indian tribe does not invalidate jurisdiction in appointing a guardian. Farrington *v.* Wilson, 29 Wis. 383.

[7] Kaye's Case, L. R. 1 Ch. 387; Battle *v.* Vick, 4 Dev. 294; White *v.* Pomeroy, 7 Barb. 640; Nelson *v.* Green, 22 Ark. 367.

terested have not a fair opportunity to be heard upon the petition, his appointment may be set aside on appeal.[1]

Where the father of an infant is living, courts have ever been unwilling to assume jurisdiction. Chancery, according to the old rule, as we understand Blackstone to mean,[2] could not appoint a guardian except for fatherless children. But the correctness of this principle was afterwards doubted ; and when the rule became settled, in Lord Thurlow's time, that the father could not give a valid receipt for his child's legacy, the necessity of appointing a guardian to collect and hold personal property was apparent.[3] And since the substitution of chancery and probate wards in practice for socage wards, guardianship of the minor in the father's lifetime has frequently been sought in the courts.[4]

But the English chancery reluctantly interferes with the father's rights in such cases. Lord Chancellor Hart in 1828 refused to bestow the chancery guardianship of a minor upon a third person, on the ground that the father is guardian of his own children by paramount title and common right. And while he admitted that the court should in all cases assume the superintendence of the child's fortunes, he added, that during the father's life no other could be placed over the child, except under very peculiar circumstances, and even then rather as a curator than a guardian.[5] And the later decisions are to the same effect; as, for instance, *Fynn's Case*, where Vice-Chancellor Bruce refused to make the mother a chancery guardian of her children against the father's wishes, though satisfied that the latter was unable to maintain them, and was such a person as would not have been selected for the guardianship of another person's children.[6]

The great difficulty which arises in the English chancery

[1] Underhill *v.* Dennis, 9 Paige, 202 ; Bowles *v.* Dixon, 32 Ark. 92. A maternal grandparent ought not to be appointed without notice to the paternal grandparent, if there be one. *Re* Feeley, 4 Redf. 306.

[2] 3 Bl. Com. 427.

[3] Cooper *v.* Thornton, 3 Bro. C. C. 96 ; Dagley *v.* Tolferry, 1 P. Wms. 285; 2 Kent Com. 220, and cases cited; Lang *v.* Pettus, 11 Ala. 37.

[4] See *Ex parte* Bond, 8 L. J. 252, Ch.

[5] Barry *v.* Barry, 1 Moll. 210.

[6] 12 Jur. 713. And see Spence's Case, 2 Ph. 247 ; Ball *v.* Ball, 2 Sim. 35.

practice, where guardianship is sought by a stranger, namely, that a father's custody of his own children is thereby disturbed, has been frequently obviated in this country by statute. And in many States, while the father is living, probate guardians are appointed, whose powers, being limited to the infant's estate, do not come in conflict with the parental right to the ward's person.[1] Yet in other States the probate courts can only grant guardianship to orphans, that is, to fatherless children;[2] and where this is the case, chancery might assume jurisdiction in an extreme case, though the father were living. A father who is alive is not bound usually by proceedings for the guardianship of his child, to which he was not a party.[3]

§ 305. **Selection of Chancery and Probate Guardians; Subject continued.** — Most frequently the court's discretion is to be exercised, whether in chancery or probate appointments, in cases where the child is fatherless, and moreover too young to nominate for himself. Who, then, shall be selected? The mother, if living and competent for the trust, would appear to be the most suitable person, unless remarried, and so in fact is she considered in this country. But in English chancery practice it is said that no great importance is attached to her rights; while undoubtedly she and the next of kin have together the first claim.[4] And it is improper to appoint the mother without some information as to the father's family.[5] On the other hand the court refuses to select guardians for infants residing with their mother until she has indicated her own wishes.[6]

In this country, probate guardians of fatherless children are appointed with more exclusive reference to the mother's choice, and the next of kin are less favorably regarded. And it is not uncommon to find guiding principles indicated by statute for all cases. The American rule is clearly stated in a recent New Jersey case: namely, that the mother, and, after the mother, the next of kin of an infant under fourteen is en-

[1] Mass. Gen. Sts. c. 109, § 4; Clark *v.* Montgomery, 23 Barb. 464.

[2] Poston *v.* Young, 7 J. J. Marsh. 501; Hall *v.* Lay, 2 Ala. 529.

[3] Bowles *v.* Dixon, 32 Ark. 92; Tong *v.* Marvin, 26 Mich. 35.

[4] Macphers. Inf. 112.

[5] Cooke's Case, 6 E. L. & Eq. 47.

[6] Lockwood *v.* Fenton, 17 E. L. & Eq. 90; *In re* Thomas, 21 E. L. & Eq. 524. As to other relatives, see Macphers. Inf. 112.

titled to preference, and that such claim cannot be disregarded unless for some satisfactory reason.[1]

It is further stated, in this case, that a greater latitude is allowed to the court, as between relatives having no legal claim to the services of the child and the natural guardian; and reasons which might be deemed insufficient to bar the mother's rights might decide as between other relations.[2]

The leading consideration for the court should be the interest and welfare of the child; and this, which becomes almost the only rule of choice between distant kindred, may control even the selection of the father himself.[3] Hence, in a case where children had been left with their grandparents for many years with the consent of the father, who was a widower and a seafaring man, guardianship was refused to their uncle, though he had been designated by the father on his deathbed.[4] If the child is fatherless, and the mother's manner of life would be likely to exercise an unfavorable influence, she will not be appointed, nor will her wishes have much weight.[5] Nor is the appointment of an executor or administrator desirable, if a conflict of interests is thereby created.[6] Nor the selection of a stranger, when the next of kin can be had, unless the parent expressly desires it.[7] Nor of one who holds adverse religious opinions, though there is at this day far more toleration than formerly on this point, and perhaps more in the United States than in Great Britain.[8] And the objection

[1] Albert *v.* Perry, 1 McCart. 540. And see Read *v.* Drake, 1 Green Ch. 78; Allen *v.* Peete, 25 Miss. 29; People *v.* Wilcox, 22 Barb. 178; Ramsay *v.* Ramsay, 20 Wis. 507; Good *v.* Good, 52 Tex. 1; Leavel *v.* Bettis, 3 Bush, 74; Lord *v.* Hough, 37 Cal. 657. There may be a probate guardian appointed over a child against the wishes of a man and wife who have agreed in writing with the mother to take care of the child under certain stipulations. Gloucester *v.* Page, 105 Mass. 231.

[2] Albert *v.* Perry, 1 McCart. 540.

[3] Bennett *v.* Byrne, 2 Barb. Ch. 216; Compton *v.* Compton, 2 Gill, 241; Succession of Fuqua, 27 La. Ann. 271; Badenhoof *v.* Johnson, 11 Nev. 87; Janes *v.* Cleghorn, 63 Ga. 335.

[4] Foster *v.* Mott, 3 Bradf. 409.

[5] Albert *v.* Perry, 1 McCart. 540.

[6] Crutchfield's Case, 3 Yerg. 336; Isaacs *v.* Taylor, 3 Dana, 600; Massingale *v.* Tate, 4 Hayw. 30; Parker *v.* Lincoln, 12 Mass. 17.

[7] See Sullivan's Case, 1 Moll. 225; Morehouse *v.* Cooke, Hopk. 226; Lady Teynham *v.* Lennard, cited 2 Atk. 315; Spann *v.* Collins, 10 S. & M. 624.

[8] Underhill *v.* Dennis, 9 Paige, 202; Macphers. Inf. 113; *Ex parte* Whitfield, 2 Atk. 315; Voullaire *v.* Voullaire, 45 Mo. 602.

that a particular appointment will subject the ward's estate to extraordinary expense ought to be considered.[1] In general, it is the duty of the court to regard the general character of the person who applies for letters of guardianship; the influence he is likely to exert, and, if the estate be difficult to manage, his business qualifications.

On the other hand, no fanciful reasons should be allowed to determine the selection of the court between distant relations. The circumstance that the infant inherited the principal part of his property through one line of the family is not to prejudice his next of kin in the other.[2] But the fact that he has always been in the charge of his relatives on one side is entitled to weight.[3] If children are already in a good home, this is a reason why they should not be disturbed. But the mother's consent to relinquish them to a certain relative is of little avail, for it might have been extorted from her under pressure of poverty.[4] Although the prudent choice of a minor arrived at fourteen may be almost conclusive, as we have already seen, yet it would seem that while under that age his preferences are entitled to no consideration. The separation of young children from one another is to be avoided, unless in other respects quite desirable.[5]

The father's testament constitutes a guardian; but when the appointment is too informal to take effect under the statute, as constituting testamentary guardianship, a chancery or probate guardian must be appointed. In such case, the choice thus informally indicated carries great weight with the court.[6] And on general principle the death-bed wishes of the father are considered by the court; so those of the mother, in States where the mother's choice is favored at all.[7] Such wishes are not conclusive upon

[1] Bennett *v.* Byrne, 2 Barb. Ch. 216.

[2] Underhill *v.* Dennis, 9 Paige, 202; Albert *v.* Perry, 1 McCart. 540.

[3] Albert *v.* Perry, 1 McCart. 540.

[4] *Ib.*

[5] Marcellin, Matter of, 4 Redf. 299.

[6] Hall *v.* Storer, 1 Yo. & C. 556; Marcellin, Matter of, 31 N. Y. Supr. 207.

[7] Knott *v.* Cottee, 2 Ph. 192; Kaye's Case, L. R. 1 Ch. 387; Lady Teynham *v.* Lennard, 4 Bro. P. C. 302; s. c. cited 2 Atk. 315; Bennett *v.* Byrne, 2 Barb. Ch. 216; Cozine *v.* Horne, 1 Bradf. 143; Watson *v.* Warnock, 31 Ga. 716; *In re* Turner, 4 C. E. Green, 433; Badenhoof *v.* Johnson, 11 Nev. 87.

the court; and yet they may sometimes be sufficient to turn the scales.[1]

§ 306. **Same Subject; Appointment of Married Woman; of Non-Resident, &c.**— As concerns the right of a married woman to be appointed guardian, there is doubt and uncertainty. The *dicta* are apt to go one way and the decisions another; doubtless out of judicial deference to the sex. Some hold that married women are at common law capable of becoming guardians; but they draw their conclusions rather from the analogies of administration, than from positive authority in their favor. When it is considered that chancery and probate guardians are a modern creation, the ancient cases, from such species of guardianship as are now extinct, are hardly worth looking after. It is true there are several cases which sustain the acts of married women while acting as guardians, or rather *quasi* guardians; at the same time clear precedents for their actual appointment are wanting.[2] It is lately held in the English chancery court, that, while a married woman may be co-guardian with a man, her sole appointment is improper.[3] In spite of the liberal tendency of the age, we conclude that while such guardianship would not be deemed absolutely void, and is in fact sometimes sanctioned without investigation, public policy is decidedly against the appointment. Not the least important objection is the inability of married women to furnish proper recognizance and to manage trust property, without constantly encountering legal obstacles, all the more troublesome from the present uncertainty of the law of husband and wife. Hence, the English rule has been, on the marriage of a female guardian, to choose another in her stead,

[1] As to appointing a firm or a corporation, see *supra*, § 300; *Re* Cordova, 4 Redf. 66.

[2] Wallis *v.* Campbell, 13 Ves. 517. This was the case of an illegitimate child. As cited in Macphers. Inf. 111, it might be considered authority for the appointment of married women as guardians.

[3] *In re* Kaye, L. R. 1 Ch. 387. See Macphers. Inf. 111; Anon., 8 Sim. 346; Gornall's Case, 1 Beav. 347. See further, Jarrett *v.* State, 5 Gill & Johns. 27; Palmer *v.* Oakley, 2 Doug. 433; Farrer *v.* Clark, 29 Miss. 195; Holley *v.* Chamberlain, 1 Redf. 333; Kettletas *v.* Gardner, 1 Paige, 488; *Ex parte* Maxwell, 19 Ind. 88. Recent statutes in States now empower a married woman to serve as guardian. Schoul. Hus. & Wife, appendix. And see Beard *v.* Dean, 64 Ga. 248.

on the ground that she is no longer *sui juris*, and has become liable to the control of her husband; while she is said to be still at liberty to go before the master to propose herself as her own successor.

Persons residing out of the jurisdiction will not usually be appointed guardians, although one who was out of the State might yet control from a distance; for, it is said, there must be some one answerable to the court.[1] But if the sureties on the guardian's bond reside within the jurisdiction and are pecuniarily responsible, is not some one answerable to the court? And might he not have an attorney within the jurisdiction answerable for process, under statute? The cases, however, are rare where such an appointment would be advantageous to the ward for business reasons; and hence, others are usually chosen, both in chancery and probate. In some of the United States, the appointment of non-residents is prohibited by statute; and even without such prohibition the court is justified in withholding letters of guardianship at discretion, where the petitioner is beyond the reach of State process.[2] But the person selected need not reside within the jurisdiction of the county court making the appointment. Where infants are domiciled abroad, some one at home will be appointed, if a guardian is required, even though the father wishes it otherwise.[3] Exceptions to this rule have been made in strong cases, and a non-resident guardian appointed.[4]

A certain appointment may be objectionable because of property interests adverse to those of the minor. Statutes sometimes interpose; as, for instance, in rendering ineligible the administratrix of an estate in which the minor is interested.[5]

§ 307. **Method of appointing Guardian; Procedure.** — *Third.* The usual practice in chancery is for the court, as soon as the

[1] Logan *v.* Fairlee, Jacob, 193.

[2] Finney *v.* State, 9 Mo. 227. There is no such prohibition in Maine. Berry *v.* Johnson, 53 Me. 401.

[3] Stephens *v.* James, 1 M. & K. 627; Lethem *v.* Hall, 7 Sim. 141.

[4] Daniel *v.* Newton, 8 Beav. 485; *In re* Thomas, 21 E. L. & Eq. 524. A non-resident alien may be precluded. *Re* Taylor, 3 Redf. (N. Y.) 259.

[5] Scobey *v.* Gano, 35 Ohio St. 550; *Supra*, § 305.

petition is presented, to make an order for a reference to a master to approve of a proper person for the guardianship. For this purpose, the master is attended by all proper parties; and, after a full hearing, he makes his report, in which he mentions the infant's age and fortune, the evidence and legal grounds on which his approval of the guardian is based, and the maintenance proper for the child. The Vice-Chancellor confirms or varies the report at his discretion, and then makes the appointment. From his decision appeal lies to the full court.[1]

The guardian thus appointed, if guardian of the person and estate, is required to enter into a recognizance, with sufficient sureties, to account regularly or whenever called upon by the court. But, according to the modern English practice, guardians of the person and not of the estate are exempted from this requirement.[2]

In some cases, guardians are appointed by the court without reference to a master. Thus, where the father applies, or the infant above fourteen makes a selection, the court acts without reference, out of regard for their special privilege.[3] And where the property of the infant is very small, the same favor has been granted, in order to save legal expense to the estate.[4] The child should usually be present at the hearing; but, in a recent Irish case, the court dispensed with the requirement, on evidence that the child was less than a month old and of delicate health.[5]

Our American practice in the appointment of probate guardians is usually more simple. Petition is presented by the person desiring the appointment, whereupon a citation is issued, for all parties interested to appear on a certain court day. The judge, upon the day specified, after a summary hearing, appoints the guardian, and issues letters of guardianship upon filing bond with proper security. Appeal may be taken within a limited time by any person aggrieved, and

[1] Macphers. Inf. 106, 107, and cases cited; 2 Kent Com. 227.

[2] Macphers. Inf. 107, 108; 2 Kent Com. 227.

[3] *Supra*, §§ 301, 304; Macphers. Inf. 78, 109.

[4] *Ex parte* Bond, 11 Jur. 114.

[5] Stutely *v.* Harrison, 1 Ired. Eq. 256; 13 Jur. 800. And see Benison *v.* Worsley, 15 E. L. & Eq. 317.

the tribunal of last resort then hears the parties, determines the choice, and makes a final decree, — to which the lower court conforms and issues letters of guardianship accordingly. The infant, if under fourteen, is rarely produced in court, nor does the judge make an order of reference.[1]

§ 308. **Effect of Appointment; Conclusiveness of Decree, &c,** — *Fourth.* The appointment of a chancery guardian is of itself an act exercised by the court of highest authority, in such matters. The appointment cannot be impeached elsewhere, nor set aside by a common-law tribunal. The court which creates the guardian superintends his acts and removes him if necessary. Such is the nature of chancery jurisdiction wherever it exists.[2] But the effect of appointments made by probate authority is not the same. In general, the same principles apply as in grants of administration; probate jurisdiction being much the same, whether over the estates of deceased persons or of infants. For fraud or excess of jurisdiction, letters of probate guardianship may be attacked collaterally; not otherwise. And a person sued in the common-law courts cannot defend on the ground that the guardian is unsuitable for his trust. The letters of guardianship sufficiently disprove it. They are the guardian's credentials of authority everywhere, and, if improperly issued, should be revoked by the court which can issue them.[3]

[1] For practice in particular States, see local statutes; also Smith's (Mass.) Prob. Practice; Comst. Dig.; Reese (Ga.) Manual; Watson *v.* Warnock, 31 Ga. 716. Next of kin may appeal. Taff *v.* Hosmer, 14 Mich. 249. And see *Re* Feeley, 4 Redf. 306.

As to the requisites in appointing guardian for an insane person, see Angell *v.* Probate Court, 11 R. I. 187. Where the intended ward is of full age, notice to him is the only notice needful, unless the statute prescribes otherwise. Hamilton *v.* Probate Court, 9 R. I. 204. But statutes differ on this point. Morton *v.* Sims, 64 Ga. 298.

A minor entitled to his own choice may appeal if that choice is not respected by the court. Adams's Appeal, 38 Conn. 304; *supra*, § 301. Where appointment is made on the ground of estate, the ward being non-resident, statute requirements as to notice must be strictly pursued, or all subsequent proceedings may be rendered void. Seaverns *v.* Gerke, 3 Sawyer, 353.

[2] Macphers. Inf. 119.

[3] Speight *v.* Knight, 11 Ala. 461; Kimball *v.* Fisk, 39 N. H. 110; Mathews *v.* Wade, 2 W. Va. 464; Warner *v.* Wilson, 4 Cal. 310. As to the effect of defective notice in probate appointments, see Davison *v.* Johonnot, 7 Met. 388; Breed *v.* Pratt, 18 Pick. 115; Brigham *v.* Boston, &c. R. R. Co., 102

The decree of the court appointing a guardian is *prima facie* evidence of the ward's disability;[1] and is even held conclusive in some cases. It would be unreasonable to compel the guardian of an insane person or spendthrift to furnish proof of his ward's condition in every collateral suit on his behalf, and to encounter new investigations of facts already established, concerning which men's minds greatly differ. But the *prima facie* evidence of infancy is generally simple and easily obtained. The authority of his guardian turns upon a simple question of fact, — the date of birth. And while we apprehend that the recitals contained in letters of guardianship afford *prima facie* proof on this point, in all contests involving the guardian's authority, the presumption thus raised must be very slight, since it is common to issue letters of probate guardianship upon the mere allegation of infancy in the petition and without special proof.[2]

One who has been appointed guardian and acted as such, cannot deny the jurisdiction of the court which appointed him in a collateral suit.[3] If he ascertains that his appointment was without jurisdiction, he should surrender his letters at once and cease to act. But, as we shall presently see, a liability may exist from the fact that one irregularly or wrongly appointed undertakes the office of guardian.[4]

Mass. 14; Cleveland *v.* Hopkins, 2 Aik. 394; Redman *v.* Chance, 32 Md. 42; Chase *v.* Hathaway, 14 Mass. 222; People *v.* Wilcox, 22 Barb. 178; Palmer *v.* Oakley, 2 Doug. 433; Sears *v.* Terry, 26 Conn. 273; Gronfier *v.* Puymirol, 19 Cal. 629. As to other informalities, see State *v.* Hyde, 29 Conn. 564; Lee *v.* Ice, 22 Ind. 384. The letter of guardianship need not recite the mode and particulars of nomination, but is in the nature of a certificate or commission. King *v.* Bell, 36 Ohio St. 460; Burrows *v.* Bailey, 34 Mich. 64. A guardian appointed by the probate court of a State in rebellion must be reappointed when the rightful government is re-established. Troy *v.* Ellerbe, 48 Ala. 624.

Where there was jurisdiction for appointment both on grounds of lunacy and infancy, after lapse of time, presumption is favored that the court made the appointment cover both grounds, or performed its full duty. King *v.* Bell, 36 Ohio St. 460. Here a new bond was taken after the ward arrived at full age.

[1] White *v.* Palmer, 4 Mass. 147.

[2] Leonard *v.* Leonard, 14 Pick. 280. See 2 Greenl. Evid. §§ 363–368.

[3] Thurston *v.* Holbrook's Estate, 31 Vt. 354; Hines *v.* Mullins, 25 Ga. 696; Fox *v.* Minor, 32 Cal. 111; State *v.* Lewis, 73 N. C. 138.

[4] See *quasi* Guardian, *post*, c. 4.

§ 309. **Civil-Law Rule of appointing Guardians.** — The principles of the civil law, as later adopted in Holland, France, and Spain, with reference to the jurisdiction and method of appointing guardians, differ not greatly from ours. The jurisdiction competent to make the selection was that of the domicile of the minor, or in which his property was situated. Under the French Code, a family council is called together at the instance of the parties interested, and nominates a suitable person or persons to take the trust, where the children are orphans and not otherwise provided for; and these persons, when they are approved by the judge, take an oath well and faithfully to discharge their trust and complete the necessary qualifications. In Louisiana, the selection is made by the family council in a similar manner.[1]

CHAPTER III.

TERMINATION OF THE GUARDIAN'S AUTHORITY.

§ 310. **How the Guardian's Authority is terminated.** — Guardianship lasts until the end of the period for which it was instituted. But it may be sooner terminated by the death or marriage of the ward, or by the death, resignation, removal, or supersedure of the guardian himself; or, if the guardian be a female, by her marriage. These topics will be considered in order.

§ 311. **Natural Limitation; Ward of Age, &c.** — As the relation of guardian and ward usually exists for merely temporary purposes, it is plain that, when those purposes are fulfilled, the trust must terminate. The object of guardianship, in the case of infants, is fulfilled when the infant becomes of age, for he is then free and competent, under the law, to transact his own business and control his own person. No guardian therefore, of an infant, whether a socage, natural, testamen-

[1] 3 Burge Col. & For. Laws, 938-943; 2 Kent Com. 231.

tary, chancery, or probate guardian, can act in such capacity after the ward is twenty-one years old or has reached majority; but should present his account and settle with the late ward.[1]

But the natural limitation of the guardian's authority may be even sooner, if derived from testamentary appointment. For the testator may designate a shorter period or some particular event which shall determine the relation. Thus, if he appoints his wife to be guardian until her remarriage, her trust terminates on marrying again.[2] And if no successor was indicated in the will, a chancery or probate appointment must supply the vacancy.[3]

The legal authority of guardians in socage also terminated, strictly speaking, when the infant became fourteen.[4] So did that of guardians for nurture, as distinguished from those by nature.[5] This was because the ward was recognized as partially qualified to act for himself, having passed through the period of nurture. He was then allowed to elect a guardian.[6] Still the guardianship continued effectual during minority in both cases, unless a new choice was made by the ward.[7] But no guardians in socage, for nurture, testamentary, or by judicial appointment, were ever rendered devoid of power by the mere fact that the infant had passed the period of nurture. An anomalous exception is found in Ohio, where it has been held that probate guardianship wholly ceases when the ward reaches twelve if a female, or fourteen if a male, and that a new appointment must then be made.[8] This rule is, however, one of statutory construction; and while the ward, on arriving at fourteen, may have the statute

[1] 1 Bl. Com. 461, 462, Harg. *n.*; 2 Kent Com. 221–227. Statutes relative to guardianship are sometimes explicit on this point. Bourne *v* Maybin, 3 Woods C. C. 724; Stroup *v.* State, 70 Ind. 495.

[2] Selby *v.* Selby, 2 Eq. Ca. Ab. 488; Holmes *v.* Field, 12 Ill. 424; Corrigan *v.* Kiernan, 1 Bradf. 208.

[3] Macphers. Inf. 104, and cases cited; *supra*, §§ 287, 290, 303.

[4] 1 Bl. Com. 461, Harg. *n.*; 2 Kent Com. 222.

[5] *Ib.*

[6] 1 Bl. Com. 462, Harg. *n.*; and see ch. 1, *supra*.

[7] Rex *v.* Pierson, Andr. 313; Mendes *v.* Mendes, 3 Atk. 624. And see Macphers. Inf. 41, 65; Byrne *v.* Van Hoesen, 5 Johns. 66.

[8] Perry *v.* Brainard, 11 Ohio, 442; Maxson *v.* Sawyer, 12 Ohio, 195. See Dibble *v.* Dibble, 8 Ind. 307; Matter of Dyer, 5 Paige, 534.

right to choose a new probate guardian, the rule is that such guardian should be first designated, judicially approved and qualified before the former guardian can be considered as discharged from his trust.[1]

No more precise limit can be assigned to the authority of guardians over insane persons and spendthrifts, than that of the ward's necessities. When he becomes restored to reason, or is otherwise fit to control his own person and estate, this guardianship ceases; for the purposes of the trust are felt no longer. But a period so difficult to fix should be judicially determined; for which cause a formal discharge from guardianship is to be sought and obtained, and meantime the guardian's authority will continue.[2]

§ 312. **Death of the Ward.** — Death of the ward necessarily terminates guardianship. And after the ward's death the guardian's only duty is to settle up his accounts and pay the balance in his hands to the ward's personal representatives, whereupon his trust is completely fulfilled.[3]

§ 313. **Marriage of the Ward.** — The lawful marriage of any ward, whether male or female, must necessarily affect the rights of the guardian. So far as the ward's person is concerned, there can be no question that the guardianship ends. Marriage is paramount to all other relations, and its proper continuance being inconsistent with guardianship of the person, the latter yields to it, whatever may be the sex of the ward. But as to the estate, the rule, in view of late married women's statutes, is not so clear. If, however, a male ward marries a female, whether she be minor or adult, his guardian retains power over his estate, as before, until he becomes of age.[4]

[1] Bryce *v.* Wynn, 50 Ga. 332. *Supra*, § 301.

[2] Dyce Sombre's Case, 1 Phil. Ch. 437; Hovey *v.* Harmon, 49 Me. 269; Wendell's Case, 1 Johns. Ch. 600; Kimball *v.* Fiske, 39 N. H. 110; Chase *v.* Hathaway, 14 Mass. 222; Hooper *v.* Hooper, 2 Mich. 435.

[3] In some States the guardian is charged with administering his deceased ward's estate. Beavers *v.* Brewster, 62 Ga. 574.

[4] Reeve Dom. Rel. 328; 2 Kent Com. 226; Bac. Abr. Guardian (E); Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 103; Mendes *v.* Mendes, 3 Atk. 619; *ib.* 1 Ves. 89; Jones *v.* Ward, 10 Yerg. 160. The guardian of an infant husband is clothed with the husband's power of reducing to possession. Ware *v.* Ware, 28 Gratt. 670. And see *supra*, §§ 56, 71.

Hence arises a difficulty where a male and female ward marry, both being minors and having estates in the hands of their respective guardians. Does the husband, though under age, take all the rights of an adult husband? Or does the wife's estate remain in keeping of her guardian until the husband is old enough to control it in person? The better opinion is that it goes to the husband, whatever his age. The inevitable consequence is that the husband's guardian must take it from the wife's guardian, and hold both estates during minority. This seems an awkward arrangement, but it is nevertheless the lawful one. More troublesome would be a case under the recent statutes in this country relative to married women, concerning which we do not find an important decision. But it seems the technical rule applies, as before, to the detriment of the female ward's interests. It might be well to declare by statute that the wife's guardian shall continue to manage her estate during her minority.[1]

The marriage of the female ward, it is said, does not, *ipso facto*, determine the authority of her guardian over her estate. Hence an order of court, transferring the custody of the property to the husband, is first necessary; to which order the husband will be entitled upon motion. Such is the rule declared in New York.[2] But while in England the Court of Chancery never appoints a guardian for a female infant after marriage, neither does it discharge an order for a guardian because of marriage; because, as Mr. Macpherson thinks, the marriage of a female, if valid, supersedes guardianship, of its own force.[3] Probate wards in this country are frequently married, and their guardians settle their accounts without order of court or revocation of letters, on the supposition that the marriage *ipso facto* puts an end to their authority. In some recent cases of alleged trespass on a female infant's lands, it has been ruled that the adult husband succeeds to the place of her guardian, all other

[1] See Reeve Dom. Rel. 328; 2 Kent Com. 226; Anon., 8 Sim. 346.

[2] Whitaker's Case, 4 Johns. Ch. 376. But see *contra*, Jones *v.* Ward, 10 Yerg. 160; Nicholson *v.* Wilborn, 13 Ga. 467; Anon., 8 Sim. 346; Armstrong *v.* Walkup, 12 Gratt. 608.

[3] Macphers. Inf. 113, citing Roach *v.* Garvan, 1 Ves. 160; 8 Sim. 336.

guardianship ceasing at her marriage.[1] And it is held that a female infant's guardian is not responsible to her for money which was hers, and which he has paid over to her adult husband, in good faith, without any notice or presumption of her non-concurrence.[2] The local statute is sometimes explicit enough to relieve one of doubt on the main question.[3]

§ 314. **Death of the Guardian.** — Guardianship is terminated by the death of the guardian. But the ward does not thereby necessarily become free, for a successor in the trust continues to control him. The executor or administrator of the guardian, as such, has no authority; for guardianship is a personal trust and not transmissible. But he should close the accounts of the deceased guardian in court and pass the balance over to the successor. This successor is the person next indicated in the will appointing testamentary guardians, or the survivor of joint guardians, or some one appointed in chancery or probate to fill the vacancy, as the case may be.[4]

§ 315. **Resignation of the Guardian.** — The office of a guardian was regarded as something so honorable at the common law that it could not be easily refused, much less resigned. Natural guardians, of necessity, could not resign. We have seen, in another connection, how far the natural guardian may practically surrender his children's custody, by allowing others to adopt them, by placing them in a charitable institution, and the like; which is the only sense in which this guardianship may be considered as voluntarily transferred. So guardians in socage, being designated by the law, could not in strictness resign; if they could shift their authority at all, it

[1] Porch *v.* Fries, 3 C. E. Green, 204; Bartlett *v.* Cowles, 15 Gray, 445.

[2] Beazley *v.* Harris, 1 Bush, 533. See, as to the wife's remedies, Story *v.* Walker, 64 Ga. 614.

[3] Some local codes declare that when the female ward marries an adult the guardianship shall cease. Bourne *v.* Maybin, 3 Woods C. C. 724; Kidwell *v.* State, 45 Ind. 27; State *v.* Joest, 46 Ind. 235. In Alabama the married ward may call her guardian to account. Wise *v.* Norton, 48 Ala. 214. See, as to adult husband's settlement, 60 Ind. 41.

[4] Co. Litt. 89; Bac. Abr. Guardian (E); Connelly *v.* Weatherly, 33 Ark. 658. When a guardian, whose authority has terminated on the ward's arrival at majority, becomes administrator of the ward's estate, the ward dying soon after and before the guardianship accounts are closed, his liability for the property is that of administrator. Hutton *v.* Williams, 60 Ala. 107. See *post*, c. 9, as to marriage of a ward.

must have been by assignment. There is reason to believe that, before the statute of Marlbridge,[1] they could assign, but only to the extent of placing the ward's body in custody of another. In later times, no assignment whatever has been permitted. For, as Lord Commissioner Gilbert observed, guardianship in socage is an interest, not of profit, but of honor, committed to the next of kin, inherent in the blood; and therefore not assignable.[2]

The resignation of a testamentary guardian is not, as a rule, permitted. In 1752 the guardians of the young Earl of Spencer, who was then in his eighteenth year, petitioned the Court of Chancery that they might be discharged from their trust, as he was then going abroad on his travels, and would not be under their care. Lord Hardwicke (as the reporter says) refused it with some warmth, as a thing which had never been done at the request of the guardians themselves; and added that, if they would not continue to act in the trust, as they had accepted it, he should compel them. But afterwards, at the importunity of counsel, finding that the mother and the infant also acceded to the request, he yielded so far as to allow a petition to be filed on behalf of the infant, upon which he made an order that the care and direction of the infant's education and person should be committed to two near relatives until further order, and that the allowance for his maintenance and education should be paid to them. But in doing so the Lord Chancellor declared that while the special circumstances of this case justified his action, he would not in general comply with such petitions, nor should this case be drawn into precedent. The court, he added, must take care of the infant, even though it did not punish the guardian for not doing so.[3]

Though this was a case of testamentary guardianship, we presume the rule to be equally strict, or nearly so, in case of a chancery guardian. In either instance the court can make

[1] 52 Hen. III. c. 17.

[2] Gilb Eq. Rep. 175. For full discussion, see Macphers. Inf. 25–27; Co. Litt. 88 *b*, Harg. *n.* 13, and authorities cited.

[3] Spencer *v.* Earl of Chesterfield, Ambl. 146.

an order, as deemed best for the infant's interests. There need be no summary removal. Chancellor Kent, in *Ex parte Crumb*, claimed that chancery could doubtless discharge or charge a guardian, even if appointed by a surrogate ; but that in the case of a testamentary guardian there should be very special reasons for interference. He refused here, however, to make any change, there being no special cause shown.[1]

It is now frequently provided by statute that probate guardians and other trust officers may, in the discretion of the court, be allowed to resign. But in absence of such legislation it would appear that no such guardian can resign as a matter of right ; nor can the probate court legally accept his resignation and appoint a successor. Yet it is held in Illinois that, under a statute which permits the judge "to remove guardians for good and sufficient cause," he may consider resignation a sufficient cause, and thereupon discharge the guardian.[2] There is something harsh and offensive in the removal of a guardian from office. Moreover, numerous unforeseen emergencies may arise, so as to render the continuance of the trust improper ; as if the guardian should become a confirmed invalid, or make himself obnoxious to the ward and his relations, or display a want of prudence in managing the estate not inconsistent with good intentions nor sufficiently gross to justify a court in removing him. He might be fully aware of the advantage of a change to all parties concerned, and might desire to be relieved, provided he could withdraw with honor, and without submitting to a humiliating investigation of petty and insufficient grounds of complaint. This opportunity is afforded in allowing him to resign. So, too, the guardian's convenience, apart from all other considerations, might lead him to withdraw. And further, as one has observed of testamentary appointees, "it can never be for the infant's benefit to continue him in the care of a negligent or reluctant guardian." [3]

[1] *Ex parte* Crumb, 2 Johns. Ch. 439. See 2 Kent Com. 227.

[2] Young *v.* Lorain, 11 Ill. 624. See Pepper *v.* Stone, 10 Vt. 427.

[3] Macphers. Inf. 128, commenting upon Spencer *v.* Earl of Chesterfield, *supra*. As to a guardian's resignation, see King *v.* Hughes, 52 Ga. 600 (guardianship of a lunatic).

§ 316. **Removal and Supersedure of the Guardian.** — The chancery court may undoubtedly remove all guardians of its own appointment, and substitute others at discretion for proper cause. This rule extends still further: for, according to American authority, chancery may remove all guardians, whether appointed by the court itself, by probate tribunals, by testament, or even by express act of the legislature, whenever the guardian abuses his trust or the interests of the ward require it.[1] This statement is somewhat too sweeping, so far as the English courts are concerned. So, too, probate tribunals are authorized in most if not all of the States to remove guardians of their own appointment on good and sufficient cause.[2]

And as two persons, or sets of persons, cannot at the same time hold the same trust, it follows that one guardian must be removed, or a vacancy otherwise created, before the court can make a new appointment. This principle, apparently simple, has sometimes been overlooked; when, for instance, a court has issued new letters without revoking the old, or seeks to supersede a testamentary by a probate guardian. The appointment of a new guardian does not of itself terminate the authority of one previously chosen. It is an act without jurisdiction, and void. But natural guardians need not be formally removed, nor guardians in socage. The rule applies only to guardians testamentary and guardians by judicial appointment, who hold by a higher authority than either of these.[3]

If a guardian does not behave to the satisfaction of the Court of Chancery, orders regulating his conduct are frequently made upon him; and if any such steps be taken as

[1] Cowls *v.* Cowls, 3 Gilm. 435. See *Ex parte* Crumb, 2 Johns. Ch. 439; Disbrow *v.* Henshaw, 8 Cow. 349. A testamentary guardian, in many States, may now be removed on the same grounds which warrant the removal of a probate guardian. Damarell *v.* Walker, 2 Redf. 198. But sound discretion should be used. Sanderson *v.* Sanderson, 79 N. C. 369.

[2] Simpson *v.* Gonzales, 15 Fla. 9; *Re* Clement, 25 N. J. Eq. 508; McPhillips *v.* McPhillips, 9 R. I. 536.

[3] Bledsoe *v.* Britt, 6 Yerg. 458; Grant *v.* Whitaker, 1 Murph. 231; Robinson *v.* Zollinger, 9 Watts, 169; Fay *v.* Hurd, 8 Pick. 528; Thomas *v.* Burrus, 23 Miss. 550; 2 Ch. Cas. 237; Morgan *v.* Dillon, 9 Mod. 141; Copp *v.* Copp, 20 N. H. 284.

to induce suspicion that the infant will suffer by the conduct of the guardians, the court will interpose.[1] This is the English rule as to guardians in general. But in this country, probate guardianship is usually determined for misconduct by a summary removal.

There can be no removal of a probate guardian without cause shown.[2] Courts of chancery are equally bound to observe this principle; but their discretion is absolute. A mere stranger cannot apply to have a guardian removed; it must be a party in interest.[3] Nor can one who has been properly removed, though the mother herself, claim any right of recommending a successor.[4]

Among the causes which have been deemed sufficient for the removal of a guardian are these: Appointment to the trust without proper notice to other parties interested.[5] Gross and confirmed habits of intoxication.[6] Any breach of official duties amounting to misconduct.[7] Failure to file inventory or accounts as required by the terms of his trust.[8] Employing the ward or using the ward's funds for the guardian's own advantage, to the ward's detriment.[9] Failure to support the ward with income ample for doing so, especially if the guardian be the father.[10] Abandonment of the trust.[11] Ignorance or imprudence on the part of the guardian, whereby the ward's interests suffer.[12] Waste of the ward's estate.[13] But not insolvency alone; though it is otherwise where one has been adjudged a bankrupt, or is guilty of fraud.[14] Nor is inter-

[1] Roach *v.* Garvin, 1 Ves. 160; Duke of Beaufort *v.* Berty, 1 P. Wms. 705.

[2] Whitney *v.* Whitney, 7 S. & M. 740.

[3] Colton *v.* Goodson, 1 How. (Miss.) 295.

[4] Hamilton *v.* Moore, 32 Miss. 205.

[5] Morehouse *v.* Cooke, Hopk. 226; Ramsay *v.* Ramsay, 20 Wis. 507.

[6] Kettletas *v.* Gardner, 1 Paige Ch. 488.

[7] Barnes *v.* Powers, 12 Ind. 341; Sweet *v.* Sweet, Speers Eq. 309; O'Neil's Case, 1 Tuck. (N. Y. Surr.) 34.

[8] Kimmel *v.* Kimmel, 48 Ind. 203: Dickerson *v.* Dickerson, 31 N. J. Eq. 652.

[9] Snavely *v.* Harkrader, 29 Gratt. 112.

[10] *Re* Swift, 47 Cal. 429.

[11] Lefever *v.* Lefever, 6 Md. 472.

[12] Nicholson's Appeal, 20 Penn St. 50.

[13] Dickerson *v.* Dickerson, 31 N. J. Eq. 652.

[14] Chew's Estate, 4 Md. Ch. 60; Cooper's Case, 2 Paige Ch. 34. See Lord Thurlow, in Smith *v.* Bate, 2 Dick. 631.

meddling with the estate before qualification as guardian a ground for removal, if in good faith and by advice of counsel.[1] In Indiana, as the statute provides, one can be displaced for unfaithful performance of the trust or insufficient security.[2] Guardians may in some States be removed wherever it will be for the ward's interest.[3] And it appears that there may be a combination of circumstances to justify the removal.[4] "Improper conduct," in respect of the care of the property or of the ward's person, is sometimes the statute rule.[5] And in Massachusetts such conduct of a guardian as tends to alienate his infant ward's affections from the mother, who is a person of good character, will justify his removal, notwithstanding the mother may have remarried.[6]

Religious opinions were formerly made a test of the guardian's capacity to act. Such conflicts seldom arise at the present day. It was held in a Pennsylvania case, a few years ago, that difference of belief on religious subjects constitutes no cause for a guardian's removal, if no harsh or unfair means have been used to erase the impressions left by the parents on the child's mind.[7]

§ 317. **The Same Subject.** — For the same reason that non-residents are held incompetent for appointment, guardians must surrender their authority when they move out of the jurisdiction, or the court will take it from them. This rule is not uniform, however, in all the States. Under the statutes now, as formerly, in Indiana, Alabama, and some other States, removal from the State constitutes *per se* a ground for displacement from office.[8] But since, as we have seen, non-residents may sometimes be appointed guardians on filing security, the more reasonable rule is to make them liable to displacement whenever, as non-residents, they could not have been appointed in the first instance.[9] Removal from the juris-

[1] Stone *v.* Dorrett, 18 Tex. 700.

[2] Morgan *v.* Anderson, 5 Blackf. 503; West *v.* Forsythe, 34 Ind. 418.

[3] *Ex parte* Crutchfield, 3 Yerg. 336.

[4] Windsor *v.* McAtee, 2 Met. (Ky.) 430.

[5] Slattery *v.* Smiley, 25 Md. 389.

[6] Perkins *v.* Finnegan, 105 Mass. 501.

[7] Nicholson's Appeal, 20 Penn. St. 50: *supra*, § 306.

[8] Nettleton *v.* State, 13 Ind. 159; Cockrell *v* Cockrell, 36 Ala. 673.

[9] See Speight *v.* Knight, 11 Ala. 461;

diction with the ward's funds may justify summary proceedings.[1]

As in making appointments, the court is allowed a liberal discretion over removals, and its decision will not be reversed on appeal unless palpable injustice has been done.[2] But the guardian is entitled to notice before removal, that he may appear in defence; and, if removed without such notice, unless he has waived it by his voluntary appearance in court, he has good ground for appeal; and it is doubtful whether a new appointment under such circumstances has any validity whatever.[3] The authorities are clear in requiring notice wherever proceedings for removal involve the guardian's personal character; but where the discharge is sought on other grounds, and the ward's rights are deemed of paramount importance, as when one under guardianship for insanity is restored to reason, or a ward arrived at fourteen wishes to exercise the privilege of nominating a successor, removals without notice are sometimes sustained;[4] still the better opinion is in favor of notice in all cases.[5]

It is held in Vermont that when a guardian who has been removed from office appeals, and in the meantime another has been appointed in his place and given bonds, the powers of the old guardian cease, and the new one takes control, until he is restored.[6]

We have seen that chancery courts in this country claim the right of removing testamentary guardians. In England, the rule is not laid down so strongly. Testamentary guardians are not removed, but superseded in their functions: a refinement adopted, it is said, out of deference to the act of

also *supra*, § 306; Succession of Bookter, 18 La. Ann. 157. Going into the Confederate lines during the war did not forfeit tutorship. Clement *v.* Sigur, 29 La. Ann. 798.

[1] State *v.* Engelke, 6 Mo. App. 356.

[2] Nicholson's Appeal, 20 Penn. St. 50; Isaacs *v.* Taylor, 3 Dana, 600; Young *v.* Young, 5 Ind. 513.

[3] Hart *v.* Gray, 3 Sumn. 339; Gwin *v.* Vanzant, 7 Yerg. 143; Myers *v.* Pearsoll, 17 Ind. 405; Croft *v.* Terrell, 15 Ala. 652. As to a revocation of letters where the trust has never been fully assumed, or the appointment was illegal, less strictness is requisite. See Scobey *v.* Gano, 35 Ohio St. 550.

[4] Hovey *v.* Harmon, 49 Me. 269; *supra*, ch. 2.

[5] Montgomery *v.* Smith, 3 Dana, 599; Copp *v.* Copp, 20 N. H. 284; Lee *v.* Ice, 22 Ind. 384. But see Cooke *v.* Beale, 11 Ired. 36.

[6] State *v.* McKown, 21 Vt. 503.

Parliament.[1] In this sense are to be understood certain expressions of Lord Hardwicke and Lord Redesdale, which would seem to extend the authority of the court to actual removal from office.[2] Lord Nottingham, in *Foster* v. *Denny*, said that he could not remove a guardian constituted by act of Parliament.[3] This is still the doctrine of the English chancery; but it exercises full jurisdiction in ordering infants to be made wards of court, with suitable directions for their maintenance and education; and it will restrain the testamentary guardian from interference with the person and estate of wards thus taken under its protection.[4]

By the common law, certain persons, as idiots, lunatics, deaf and dumb persons, persons under outlawry or attainder, and lepers removed by writ of leprosy, were passed over in the guardianship. And where a guardian became incapable of acting, the office devolved upon the next person to whom the inheritance could not descend.[5] Such guardians do not appear to have been removed from office. But there can be little doubt that the insanity of a probate or chancery guardian would be good cause for his removal or supersedure; and a final settlement of his guardianship accounts would properly be required from his own guardian.[6]

§ 318. **Marriage of Female Guardian.** — The marriage of a female guardian may terminate her authority; though that of a male guardian never does. The old rule of the common law appears to have been, that when a female guardian in socage married, her husband became guardian in right of his wife; but that on her death guardianship ceased on his part, and went to the infant's next relation.[7] Testamentary guardianship in England seems to be left to the operation of the will in such cases: chancery refusing to interfere with the

[1] Macphers. Inf. 128.

[2] Lord Hardwicke, in Roach *v.* Garvan, 1 Ves. 160; Lord Redesdale, in O'Keefe *v.* Casey, 1 Sch. & Lef. 106.

[3] 2 Ch. Cas. 237.

[4] Smith *v.* Bate, 2 Dick. 631; Ingham *v.* Bickerdike, 6 Madd. 275. See also M'Cullochs, *In re*, 1 Dru. 276; 12 Jur. 100.

[5] Co. Litt. 88, 89; Macphers. Inf. 24, 25.

[6] Modawell *v.* Holmes, 40 Ala. 391; Damarell *v.* Walker, 2 Redf. 198.

[7] Co. Litt. 89 *a*; Bac. Abr. Guardian and Ward (E). See 7 Vt. 372.

testator's own directions.[1] But it is customary for the father to designate successors in the event of marriage. What has already been said on the subject of appointing married women guardians applies, likewise, in this connection.[2] Certainly, if marriage does not absolutely put an end to the guardian's authority, it has the common-law effect of joining her husband in the trust;[3] and yet, according to some American statutes, the fact of marriage would only render her liable to removal. In Louisiana, the mother, by the advice of a family meeting, previous to her remarriage, may be retained in the tutorship of her minor children, notwithstanding her remarriage;[4] but if she fails to procure such advice she loses the tutorship.[5]

§ 319. **Other Cases where a New Guardian is appointed.** — There are some other cases in which it is said that a new guardian may be appointed, as though guardianship had already determined. Thus, where a testamentary guardian has not acted, and declines to act, chancery may appoint a successor.[6] So in other cases where the guardian renounces his appointment.[7] Filing a bond, with proper security, is sometimes regarded as the condition precedent to a probate appointment, and it is thought that letters need not be revoked in such a case. But this is by no means a settled rule.[8]

[1] Macphers. Inf. 129; Morgan *v.* Dillon, 9 Mod. 135; Dillon *v.* Lady Mount Cashell, 4 Bro. P. C. 306. See Corbet *v.* Tottenham, 1 Ball & B. 59.

[2] See *supra*, § 306; Martin *v.* Foster, 38 Ala. 688; Elgin's Case, 1 Tuck. (N. Y. Surr.) 97; Leavel *v.* Bettis, 3 Bush, 74.

[3] Wood *v.* Stafford, 50 Miss. 370; *supra*, § 86. Statutes in some States change the old rule, and expressly authorize a married woman to be guardian. Schoul. Hus. & Wife, appendix. As to requiring in such case the husband's written consent to the wife's continuance in office, see Hardin *v.* Helton, 50 Ind. 319. In New York *semble* the widowed mother's remarriage terminates her guardianship, and under the statute she can be removed. Swartwout *v.* Swartwout, 2 Redf. 52. The female guardian who marries must not abandon her rights of custody; her marriage does not, in Kentucky, extinguish her authority. Cotton *v.* Wolf, 14 Bush, 238.

[4] Gaudet *v.* Gaudet, 14 La. Ann. 112.

[5] Keene *v.* Guier, 27 La. Ann. 232.

[6] *Ex parte* Champney, 1 Dick. 350; O'Keefe *v.* Casey, 1 Sch. & Lef. 106.

[7] McAlister *v.* Olmstead, 1 Humph. 210; Lefever *v.* Lefever, 6 Md. 472; Simpson *v.* Gonzalez, 15 Fla. 9.

[8] Russell *v.* Coffin, 8 Pick. 143; Fay *v.* Hurd, *ib.* 528; Barns *v.* Branch, 3 McCord, 19; Clarke *v.* Darnell, 8 Gill & Johns. 111. See West *v.* Forsythe, 34 Ind. 418; Fant *v.* McGowan, 57 Miss. 779.

Letters of guardianship obtained through material false representations may be revoked.[1]

Outlawry and attainder of treason — or what is known as civil death — did not put an end to guardianship in socage; because, it was said the guardian had nothing to his own use, but to the use of the heir.[2] The same principle doubtless applies to other guardians. But a guardian might be properly removed on such grounds. In the United States, local statutes largely regulate the general subject of terminating a guardian's authority.

CHAPTER IV.

NATURE OF THE GUARDIAN'S OFFICE.

§ 320. **Guardianship relates to Person and Estate.** — The powers and duties of a guardian relate either to the person of the ward, or to the ward's estate, or to both person and estate. As guardian of the person, he is entitled to the custody of the ward; he is bound to maintain him in a style suitable to the latter's means and condition in life; if the ward be a minor, he superintends his education and directs him in the choice of a pursuit; and in general, he supplies the place of a judicious parent. As guardian of the estate, he manages the ward's property, both real and personal, with faithfulness and care, changes investments whenever necessary, with permission of the court, pays the just debts of the ward, collects his dues, puts out his money on interest, manages his investments, keeps regular accounts, and is, in effect, the ward's trustee.[3] Whether the guardianship be in socage, testamentary, or by chancery or probate appointment, these powers and duties are essentially the same; although, as we have seen, socage guardianship was created with special ref-

[1] *Re* Clement, 25 N. J. Eq. 508. The Orphans' Court may thus revoke. *Ib.*

[2] Co Litt. 88 *b*; Macphers. Inf. 25.

[3] 2 Kent Com. 230–233.

erence to the ward's real estate.[1] Moreover, as will fully appear in the succeeding chapters, chancery and probate guardians are brought more closely under judicial control and supervision than either guardians in socage or testamentary guardians.

But while guardianship of the person resembles the relation of parent and child, it is not altogether like it. The parent must support his child from his own means; and in return the child's labor and services belong to him. But the guardian is not bound to supply the wants of his ward, except from the ward's own estate in his hands and the liberality of others, though it were to keep the child from starving. On the other hand, the guardian has no more right to the labor and services of his ward than any stranger. Nor are guardians of the estate vested with an interest precisely like that of trustees; for while the latter may sue and be sued in their official capacity, suits by and against infants are brought in the name of the ward and not the guardian.[2]

Guardians in socage acquired authority as guardians of the ward's estate; and guardianship of the estate drew after it, in such case, guardianship of the person; so that they were guardians of both person and estate.[3] Testamentary guardians under the statute of Charles II. acquire authority through the father's devise to them of the "custody and tuition" of his children; and this devise of the person carries with it, as incident, a devise of the estate; so that they too (subject to statute modifications) are guardians of both person and estate.[4] But chancery guardians are not always invested with such powers; for the court will make such orders as are needful in all cases. Chancery sometimes appoints a guardian of the person only, for a special and temporary purpose.[5] Where a suit is pending, and it becomes necessary to appoint a guardian, chancery appoints a guardian of the person only, the estate being under the direction of the court.

[1] *Supra*, ch. 1.

[2] See *infra*, Part V. c. 6.

[3] But see Bedell *v.* Constable, Vaugh. 185.

[4] Stat. 12 Car. II. c. 24, §§ 8, 9; Vaugh. 178.

[5] Macphers. Inf. 114; *Ex parte* Becher, 1 Bro. C. C 556; *Ex parte* Woolscombe, 1 Madd. 213.

But where no suit is pending, and proceedings are commenced by petition, the guardian is appointed for both person and estate.[1] Probate guardianship is subject, in great part, to local legislation; but it may be safely asserted, as a general principle, that all probate guardians are guardians of both person and estate, and that the court cannot commit guardianship of the person to one and guardianship of the property to another.[2]

The guardian is not always entitled to the custody of the infant's person; but chancery will exercise its discretion for the benefit of the latter, as to delivering him up to the guardian or permitting him to remain elsewhere, and as to the persons who are to have access to him, and the circumstances attending such access, and generally as to his education.[3] And it is the policy of our legislation to leave the child's person in his parents' keeping so far as possible. But the guardian may be a "guardian of the person and estate" notwithstanding.

§ 321. **Whether a Guardian is a Trustee.** — In discussing the rights and duties of a guardian, this question next meets us at the outset: Is or is not the guardian's office substantially that of a trustee in interest? This will be best seen by examining the different kinds of guardians, as they respectively arose.

Guardianship in socage arose very early at common law, and is the first in order. These guardians were considered as trustees. According to the old authorities, the guardian in socage had not a bare authority, but an actual estate and interest in the land, though not to his own use.[4] Hence he might elect whether to let the estate or occupy it for the ward's benefit. He was considered as entitled to the possession of the ward's property, and incapable of being removed from it by any person. In other words, this guardian had the legal, but not the beneficial, interest. Not long after the

[1] Macphers. Inf. 105; 2 Kent Com. 229.

[2] See Tenbrook *v.* M'Colm, 7 Halst. 97.

[3] Macphers. Inf. 119; Anon., 2 Ves. Sen. 374.

[4] Co. Litt. 90 *a*; Plowd. ch. 23. See next chapter.

statute of Charles II. chancery was called upon to determine the nature of testamentary guardianship. Lord Macclesfield, in the case of *Duke of Beaufort* v. *Berty*,[1] stated that testamentary guardians were but trustees; that the statute merely empowered the father to appoint a different person as guardian and to continue the relation beyond the age of fourteen and until the ward became twenty-one; and that both socage and testamentary guardians were equally trustees. And in the important case of *Eyre* v. *Countess of Shaftesbury*,[2] this principle, though with another admitted difference as to succession, was again affirmed. This general rule has received judicial sanction in England quite recently.[3]

Chancery guardianship, of still later origin, resembles in its nature testamentary guardianship. The same principles are constantly asserted in regard to both. In either case, the guardian has a vested interest in his ward's estate, may bring actions relative thereto, and make leases during the minority of the infant. He has in all respects the dominion *pro tempore* of the infant's estate and possesses more than a naked authority.[4] The same may be said of probate guardianship in this country, which, under statute modification, has become, if any thing, more like trusteeship than the other kinds.[5] And in *Thompson* v. *Boardman*[6] the analogies of the old law have been extended to the case of a spendthrift's guardian.

It is often difficult to say what in strictness is a trustee, since every trust is limited by the instrument which creates it. The powers of a guardian differ greatly from those of an executor or administrator. But so far as guardianship of the estate is concerned, a guardian is in fact a trustee; for he holds the legal estate for the benefit of another. To apply the term "agent" to the guardian's office seems therefore harsh and unnatural, whatever may be the ward's position.[7]

[1] 1 P. Wms. 703.

[2] 2 P. Wms. 102.

[3] Gilbert *v.* Schwenck, 14 M. & W. 488; s. c. 9 Jur. 693.

[4] People *v.* Byron, 3 Johns. Cas. 53.

[5] See Truss *v.* Old, 6 Rand. 556; Isaacs *v.* Taylor, 3 Dana, 600; Alexander *v.* Alexander, 8 Ala. 796; Pepper *v.* Stone, 10 Vt. 427; Lincoln *v.* Alexander, 52 Cal. 482.

[6] 1 Vt. 370.

[7] But see *dictum* of Shaw, C. J., in

§ 322. **Joint Guardians.** — Where there are two or more testamentary guardians, and one of them dies or is removed, the survivor or survivors shall continue. The very nature of the trust demands it.[1] In England, it is otherwise with joint guardians by chancery appointment; for if one dies the office determines.[2] But the survivors will be appointed without a reference,[3] so that after all the rule is only formal. In this country, the more reasonable doctrine prevails, as to both chancery and probate guardianship, that the survivors shall continue the trust, like co-executors, and on the same principle. This was declared to be the rule as to joint chancery guardians in a leading New York case.[4] And a Vermont court applies it likewise to probate guardians.[5] The statutes enacted in many of the States remove all further doubt on the subject.

Of two or more persons appointed joint guardians under a will, one may qualify without the other;[6] and where one declines to act, all the rights and powers created by the appointment under the will may devolve upon the other.[7] But while a joint guardian who had once declined the trust has no further right to be appointed, he may yet be selected in preference to others to fill a vacancy. Thus it has been held that where three testamentary guardians, one of whom was the mother, were named by the father in his will, and the mother became sole guardian by the refusal of the others to act with her, they were properly selected by the court, after the mother's death, on their own application, in preference to the person nominated in her will.[8]

On the principle that guardians are trustees, it is held that

Manson *v.* Felton, 13 Pick. 206; Muller *v.* Benner, 69 Ill. 108. And Soule, J., observes in Rollins *v.* Marsh, 128 Mass. 116, that guardians of minor spendthrifts or insane persons, have only a naked power not coupled with an interest.

As the rights and duties of such guardians, probate guardians included, depend so greatly upon local statutes, local jurisdictions may be found to differ as to the nature of the guardian's office, which, after all, is *sui generis*.

[1] See Bac. Abr. Guardian (A).

[2] Bradshaw *v.* Bradshaw, 1 Russ. 528.

[3] Hall *v.* Jones, 2 Sim. 41.

[4] People *v.* Byron, 3 Johns. Cas. 53.

[5] Pepper *v.* Stone, 10 Vt. 427. See also remarks of Chancellor Sanford, in Kirby *v.* Turner, Hopk. 309, as to the nature of joint guardianship.

[6] Kevan *v.* Waller, 11 Leigh, 414.

[7] Matter of Reynolds, 18 N. Y. Supr. 41.

[8] Johnston's Case, 2 Jones & Lat. 222.

joint guardians may sue together on account of any joint transaction founded on their relation to the ward, even after the relation ceases.[1] Also that the receipt of one is the receipt of all.[2] Also that one can maintain trespass against the other for forcibly removing the child against his wishes; as one of two joint trustees cannot act in defiance of the other.[3] And where one guardian consents to his co-guardian's misapplication of funds, he is liable.[4] The fact that one joint guardian is dead will not prevent the co-guardian's prior accounts from being opened on a final settlement in court.[5] Guardians, like other trustees, — executors and administrators excepted, — may portion out the management of the property to suit their respective tastes and qualifications, while neither parts irrevocably with the control of the whole; and in such case each is chargeable with no more than what he received, unless unwarrantable negligence in superintending the other's acts can be shown.[6] And the discharge of one who has received no part of the estate relieves him from liability.[7] On the other hand, it is presumed that the survivor of joint guardians received the whole estate, in absence of proof to the contrary.[8]

§ 323. **Judicial Control of the Ward's Property.** — In English practice, the Court of Chancery holds the ward's property within its grasp with a tightness unknown to American tribunals. The regular course is to get in all the money due the infant, and to invest it in the public funds. A receiver is, if necessary, appointed to facilitate collections, and generally the same person is made a permanent receiver of the ward's real estate, to collect all rents. Where there is an executor he will not be interfered with, except under strong circumstances of suspicion, but an administrator is treated with less consideration.[9] Even executors who are also testamen-

[1] Shearman *v.* Akins, 4 Pick. 283.
[2] Alston *v.* Munford, 1 Brock. 266.
[3] Gilbert *v.* Schwenck, 14 M. & W. 488.
[4] Pim *v.* Downing, 11 S. & R. 66. See Clark's Appeal, 18 Penn. St. 175.
[5] Blake *v.* Pegram, 101 Mass. 592.
[6] Jones's Appeal, 8 Watts & S. 143.
[7] Hocker *v.* Woods, 33 Penn. St. 466.
[8] Graham *v.* Davidson. 2 Dev. & Bat. Eq. 155.
[9] Macphers. Inf. 268, and cases cited.

tary guardians must bring their funds into court after settling up the estate of their testator.[1] Chancery, thus managing actively the ward's property, makes its own scheme for maintenance, and allows the guardian a certain fixed income accordingly.[2]

Probate guardianship in this country is quite different. Schemes of maintenance are seldom heard of. Nor are receivers appointed. The guardian usually collects his ward's dues, whether from the executor of the parent or others, and manages the property on his own responsibility, with little judicial interference. He regulates at discretion the sum proper for annual expenditure, and changes the rate when expedient. Of course he is held acountable, on legal principles much the same as those of the English chancery; but he seldom applies to the court for directions, unless some perplexity arises, or it becomes expedient to sell real estate, or when the ward cannot be supported without breaking in upon the principal fund.

§ 324. **Guardianship and other Trusts blended.** — The same person is frequently executor under the parent's will, and also guardian of the minor children. Hence the question will sometimes arise whether he holds the fund in the one or the other capacity. It is clear that where one is both guardian and executor, he cannot be sued in both capacities, nor are both sets of sureties liable.[3] He is in the first instance liable as executor; and in general, to render him liable as guardian, there should be some distinct act of transfer. His plain duty is to keep the trusts distinct and not blend them. In the former case, his accounts rendered will show the transfer of the legacy or distributive share from his account as executor to his account as guardian; and thereby his liability as guardian will become fixed.[4] But in the latter case, or if no clear evidence appears elsewhere of an actual

[1] Macphers. Inf. 118; Blake *v.* Blake, 2 Sch. & Lef. 26.

[2] Macphers. Inf. 213 *et seq.*

[3] Wren *v.* Gayden, 1 How. (Miss.) 365.

[4] Alston *v.* Munford, 1 Brock. 266; Burton *v.* Tunnell, 4 Harring. (Del.) 424, *contra*, Conkey *v.* Dickinson, 13 Met. 51; Stillman *v.* Young, 16 Ill. 318; Foteaux *v.* Lepage, 6 Clarke (Iowa), 123; Scott's Case, 36 Vt. 297.

transfer, can it be presumed? The better opinion is that, after the time limited by law for the settlement of the estate has elapsed, and there is no evidence of intent to hold longer as executor, he shall be presumed a guardian; on the principle that what the law enjoins upon him to do shall be considered as done.[1] And certainly very slight evidence would confirm any possible doubt; such as the division of the parent's estate among other heirs, the payment of legacies, or where he has placed some of the chattels on the ward's farm.[2] But the rule may be otherwise with joint executors or administrators;[3] and we need hardly add that this doctrine applies in strictness only to personal assets which pass through administration; since real estate, ordinarily, goes at once to the heir. Acts, too, inconsistent with the purpose of holding as guardian, and consistent with that of continuing administrator or executor, should not readily be construed to a ward's prejudice; but rather, if need be, serve to repel the presumption of guardianship, and in any event to aid the beneficiary who seeks redress.[4]

If a legacy is given under a will to an infant, which he is not to receive unless he attain full age, it would appear that the simpler course is for the executor to retain the fund during the infant's minority; yet it is held that a probate guardian may, at the court's discretion, be appointed to receive the fund and hold it subject to the restriction contained in the will.[5]

A guardian cannot blend distinct trusts of guardianship by appointment. Thus, where a person was appointed guardian of an infant who became insane shortly before reaching his

[1] Watkins *v.* State, 4 Gill & Johns. 220; Karr *v.* Karr, 6 Dana, 3; Crosby *v.* Crosby, 1 S. C. N. S. 337; Wilson *v.* Wilson, 17 Ohio St. 150; Townsend *v.* Tallant, 33 Cal. 45; *Re* Wood, 71 Mo. 623; Weaver *v.* Thornton, 63 Ga. 655.

[2] Johnson *v.* Johnson, 2 Hill Ch. 277; Drane *v.* Bayliss, 1 Humph. 174.

[3] Watkins *v.* State, 4 Gill & Johns. 220; Coleman *v.* Smith, 14 S. C. 511.

[4] In doubtful cases of this kind, the modern inclination is to let the ward sue both sets of sureties, or either, leaving them to adjust their equities among themselves. Harris *v.* Harrison, 78 N. C. 202. And see Coleman *v.* Smith, 14 S. C. 511. So, too, where a guardian subsequently becomes trustee. State *v.* Jones, 68 N. C. 554; Perry *v.* Carmichael, 95 Ill. 519.

[5] Gunther *v.* State, 31 Md. 21.

majority, and the same guardian continued to act, styling himself guardian of "A. B., an idiot," it was held that his trust properly expired with the infancy of the minor.[1] Nor does it matter that the probate court recognizes a continuation of the trust by passing his accounts; for an actual appointment, after the regular form, is always essential to a guardian's authority.[2]

§ 325. **Administration durante Minore Ætate.** — Where the person designated as executor of a will is under age, it becomes necessary to appoint an administrator during minority, which appointment was at common law denominated *durante minore ætate*.[3] So when the next of kin is under age, the English practice in such cases is to appoint the infant's guardian, unless there be some other next of kin competent to act; though the rule is not invariable.[4] And in the English case of *John* v. *Bradbury*, decided as late as 1866, it is affirmed that the guardian of an infant sole next of kin shall not only administer in preference to creditors, but shall be exempted from security, except in very strong cases, notwithstanding the creditors request it.[5] So he is preferred to the husband of a married woman who died after a judicial separation.[6] But in this country, while there are statutes in some States favoring similar doctrines, in others the court has full discretion in selecting a substitute for the child.[7] Such administrator has for the time being all the powers of a general administrator, but his term of office is restricted to the infant's minority.[8]

§ 326. **Quasi Guardianship where no Regular Appointment.** — A *quasi* guardianship often arises at law where there has been no regular appointment, or an appointment without jurisdiction or some intermeddling. The general principle

[1] Coon *v.* Cook, 6 Ind. 268.

[2] But see King *v.* Bell, 36 Ohio St. 460.

[3] 1 Wms. Ex'rs, 419, 420: 2 Redf. Wills, 92, 93.

[4] *Ib.*

[5] John *v.* Bradbury, L. R. 1 P. & D. 245.

[6] Goods of Stephenson, L. R. 1 P. & D. 287. But the husband usually administers. See *supra*, § 196.

[7] 1 Wms. Ex'rs, 419; 2 Redf. Wills, 94, and cases cited; Mass. Gen. Stats. c. 94.

[8] 1 Wms. Ex'rs, 428, and notes; 2 Redf. Wills, 94, 95.

thus recognized is that any person who takes possession of an infant's property takes it in trust for the infant. Hence courts of equity will always protect the helpless in such cases by holding the person who acts as guardian strictly accountable. The father may thus be a *quasi* guardian.[1] So may a stepfather.[2] Or one whose appointment as guardian was irregular or null.[3] But not an executor or administrator in rightful possession of the infant's property; for he holds in a different capacity.[4] A son who takes charge of an incompetent father's estate, with the latter's acquiescence, may make his father an equitable ward.[5] Chancery has full jurisdiction over the transactions of all persons standing *in loco parentis*.[6]

On the same principle, one regularly appointed guardian of an infant is held responsible for acts committed before qualifying as such by giving bonds.[7] And although his authority ceases when the ward attains majority, he continues personally responsible so long as his possession and control of the property continues.[8]

§ 327. **Conflict of Laws as to Guardianship.** — The guardian's authority is limited to the jurisdiction which appoints him, and does not extend to foreign countries, unless permitted by foreign laws. Every nation is sovereign within its own borders, but powerless beyond them. The rights of foreign guardians have been to some extent admitted, however, on the principle of comity.[9] These rights may be considered, *first*, as to the person of the ward; *second*, as to his estate.

§ 328. **Conflict as to Ward's Person.** — *First*, as to the ward's person. Many writers on public law claim that the guardian's authority extends everywhere. Others again deny that it ex-

[1] Pennington *v.* Fowler, 3 Halst. Ch. 343; Alston *v.* Alston, 34 Ala. 15.

[2] Espey *v.* Lake, 15 E. L. & Eq. 579.

[3] Crooks *v.* Turpin, 1 B. Monr. 185; Earle *v.* Crum, 42 Miss. 165; McClure *v.* Commonwealth, 80 Penn. St. 167; State *v.* Lewis, 73 N. C. 138.

[4] Bibb *v.* McKinley, 9 Port. 636; Minfee *v.* Ball, 2 Eng. 520.

[5] Jacox *v.* Jacox, 40 Mich. 473. See also Munroe *v.* Phillips, 64 Geo. 32; Sherman *v.* Wright, 49 N. Y. 227.

[6] Espey *v.* Lake, 15 E. L. & Eq. 579.

[7] Magruder *v.* Darnall, 6 Gill, 269.

[8] Mellish *v.* Mellish, 1 Sim. & Stu. 138; Armstrong *v.* Walkup, 12 Gratt. 608.

[9] See Story Confl. Laws, §§ 492–529.

tends beyond the jurisdiction which appoints.[1] In England, the paternal authority is recognized, even in aliens; but if an infant has a guardian appointed by any other authority out of the jurisdiction, the appointment fails as soon as the infant comes to England, and the court of chancery will thereupon appoint a guardian on petition.[2] But in a very recent case liberal favor was shown toward the foreign guardian of wards domiciled abroad. He had sent them to England to be educated, and wished to remove them to their own country in order to complete their education. The court refused to interfere with their removal, and allowed the exclusive custody to the foreign guardian; at the same time, however, refusing to discharge an order appointing English guardians.[3]

In this country, the rights and powers of guardians over the ward's person are considered strictly local, even as between different States,[4] though the paternal right would probably be recognized as in England.[5] But in Massachusetts, a few years ago, the custody of a child was awarded to a foreign guardian, in preference to one appointed within the jurisdiction; the court observing that while the former had no absolute right to the child, his office would be deemed an important element in determining to whom custody should be given.[6]

§ 329. **Conflict as to Ward's Property.** — *Second*, as to the ward's property. A distinction has been made between movables and immovables. As to immovable property, such as real estate, it is almost universally admitted that the law *rei sitæ* shall govern.[7] But writers do not agree as to movable

[1] See Story Confl. Laws, §§ 495–497, and authorities cited.

[2] Macphers. Inf. 577; *Ex parte* Watkins, 2 Ves. 470.

[3] Nugent *v.* Vetzera, L. R. 2 Eq. 704. See 27 E. L. & Eq. 451.

[4] Story Confl. Laws, § 499; Morrell *v.* Dickey, 1 Johns. Ch. 153; Kraft *v.* Wickey, 4 Gill & Johns. 332; Burnet *v.* Burnet, 12 B. Monr. 323; Boyd *v.* Glass, 34 Ga. 253; Whart. Confl. Laws, §§ 261–264; Rice's Case, 42 Mich. 528. We have seen that the courts of a State or country will take jurisdiction for the time being where the ward *bona fide* resides in the jurisdiction, though not perhaps domiciled there. *Supra*, § 303. Such appointment may not clothe the guardian with extra-territorial authority, yet it is not void.

[5] See Townsend *v.* Kendall, 4 Minn. 412.

[6] Woodworth *v.* Spring, 4 Allen, 321.

[7] Story Confl. Laws, §§ 500–502. And see *post*, c. 7. As between West Virginia and Virginia, see Rinker *v.* Streit, 33 Gratt. 663.

property, such as goods and personal chattels, whether the law of the domicile shall prevail over that of the situation. Judge Story considered the weight of foreign authority in this respect, in favor of admitting the guardian's right to prevail everywhere to the same extent as they are acknowledged by the law of the domicile.[1] And this seems to be the Scotch doctrine.[2] But according to the doctrine of the common law, now fully established both in England and America, the rights of a guardian over all property whatsoever are strictly territorial, and are recognized as having no influence upon such property in other countries where different systems of jurisprudence are established. No foreign guardian can, by virtue of his office, exercise his functions in another country or State, without taking out other letters of guardianship or otherwise conforming to the local law; while on the other hand, local courts consider their own authority competent within the jurisdiction, if the ward's property be located there. Such is the rule in both countries.[3]

But the rigor of this rule is sometimes abated. In England, personal property will, under certain circumstances, be paid to an owner who, if domiciled and resident in that country, would not be allowed to receive it.[4] So administration *durante minore ætate* has been granted to a foreign guardian.[5] In this country there are local statutes which permit non-resident guardians to sue on compliance with certain formalities, or even without them.[6] But otherwise they cannot bring actions of any sort.[7] And this seems to be the English rule

[1] Story Confl. Laws. § 503; Schouler Pers. Prop. 347–385; Wharton Confl. Laws, §§ 265, 266.

[2] Story, *ib.* § 503; Fraser Parent & Child, 604.

[3] Story Confl. Laws, § 504; *supra*, § 303; Rice's Case, 42 Mich. 528; Weller *v.* Suggett, 3 Redf. 249; Hoyt *v.* Sprague, 103 U. S. Supr. 613; Leonard *v.* Putnam, 51 N. H. 247.

[4] Macphers. Inf. 577; Goods of Countess Da Cunha, 1 Hag. 237.

[5] Goods of Sartoris, 1 Curteis, 910.

[6] *Ex parte* Heard, 2 Hill Ch. 54; Hines *v.* State, 10 S. & M. 529; Sims *v.* Renwick, 25 Geo. 58; Grist *v.* Forehand, 36 Miss. 69; Martin *v.* McDonald, 14 B. Monr. 544; Carlisle *v.* Tuttle, 30 Ala. 613; Warren *v.* Hofer, 13 Ind. 167; *Re* Fitch, 3 Redf. 457; Shook *v.* State, 53 Ind. 403.

[7] Morrell *v.* Dickey, 1 Johns. Ch. 153; Kraft *v.* Wickey, 4 Gill & Johns. 322; Rogers *v.* McLean, 31 Barb. 304. This is the rule too in Louisiana. Succession of Shaw, 18 La. Ann. 265; Succession of Stephens, 19 La. Ann. 499.

likewise.[1] Nor will the courts of one State enforce the obligation of a probate guardian's official bond with sureties given in another State.[2] But a court having general chancery jurisdiction over matters of guardianship may, it appears, in the exercise of sound discretion, and upon principles of comity, equity, and justice, order assets of the ward in the possession of a guardian resident within its jurisdiction to be delivered to the guardian abroad.[3] While courts of equity will permit property to pass to the foreign guardian, in pursuance of law, it seems that they will generally exercise discretion, and in some cases require good security,[4] in others, direct the payment of a regular allowance,[5] and in others, refuse payment altogether;[6] the welfare of the infant being always considered in such cases.

The principles applicable to non-resident guardians in this country appear in many respects similar to those in case of foreign executors and administrators, and the rules we have stated might be subjected to modification by the mutual treaty stipulations of two independent governments.[7]

§ 330. **Constitutional Questions relating to Guardianship.** — As each legislature in this country derives its authority from

[1] Story considers it doubtful. Beattie *v.* Johnston, 1 Phillips Ch. 17; 10 Cl. & Fin. 42; *contra*, Morrison's Case, cited in 4 T. R. 140, and 1 H. Bl. 677, 682.

[2] Probate Court *v.* Hibbard, 44 Vt. 597.

[3] Earl *v.* Dresser, 30 Ind. 11.

[4] Case of Andrews' Heirs, 3 Humph. 592; Martin *v.* McDonald, 14 B. Monr. 544; *Re* Fitch, 3 Redf. 457.

[5] McNeely *v.* Jamison, 2 Jones Eq. 186. And see *Ex parte* Dawson, 3 Bradf. 130; M'Liskey *v.* Reid, 4 Bradf. 334.

[6] See 2 Story Eq. Juris. § 1354 *b*; Stephens *v.* James, 1 M. & K. 627. Letters are thus granted in the State having property, ancillary to the guardianship in child's domicile or residence. Metcalf *v.* Lowther, 56 Ala. 312; Marts *v.* Brown, 56 Ind. 386. As to right of foreign guardian to petition for appointment of guardian *ad litem* without ancillary letters, see Freund *v.* Washburn, 17 Hun, 543; Shook *v.* State, 53 Ind. 403. As to a foreign guardian's right to transfer stock, see Ross *v.* Southwestern R., 53 Ga. 514. Local statutes are found to regulate this whole subject.

[7] Commonwealth *v.* Rhoads, 37 Penn. St. 60. And see Pratt *v.* Wright, 13 Gratt. 175. The guardian of a minor who receives property of his ward in a foreign country or State must account for it, unless he can show that he had accounted for it abroad. Secchi's Estate, Myrick's Prob. 225. As to the proper course for care and transfer of the ward's money when a ward removes from the jurisdiction, and a new guardian is appointed in the State of his new domicile, see Snavely *v.* Harkrader, 29 Gratt. 112.

a written constitution, questions sometimes arise in our courts as to the validity of certain statutes, which in Great Britain are of no importance, since there an act of Parliament is the supreme law. Thus it is not uncommon for our legislatures to authorize or confirm the sale of lands held by guardians and other trustees, by special statutes; and such statutes have been attacked either as an interference with the property rights of infants and their heirs, or as an usurpation of judicial functions.[1] Such acts are, however, constitutional, unless expressly forbidden, according to the best authorities, where, at least the object is simply to provide for a change of investment for the beneficiary, and not to divest the latter of property rights.[2] But in a New Jersey case, it was intimated by the Chancellor that, if fraud or sinister motives on the guardian's part were shown, the special act might be judicially avoided.[3] An act of the legislature may authorize a certain guardian to sell the real estate of his infant ward, subject to the approval of the sale by the probate court.[4] It is held that the legislature may enable a foreign guardian to sell lands within the State.[5] So a general law may be enacted for enabling guardians and other trustees to enter into agreements as to the disposition of property held by them, consistently with constitutional provisions which protect the rights of individuals; notwithstanding the rights of persons remotely interested in the estate, who are either not in existence or only contingently concerned, may be thereby compromised without their assent.[6] Doubtless the wiser policy of the legislature is to refer all cases of this kind to the courts under general laws; and thus do some State constitutions expressly require.[7]

[1] See Davison *v.* Johonnot, 7 Met. 388, for a full discussion of the question.

[2] Clarke *v.* Van Surlay, 15 Wend. 436; Cochran *v.* Van Surlay, 20 Wend. 365; Davison *v.* Johnnot, 7 Met. 388; Snowhill *v.* Snowhill, 2 Green Ch. 20; Brenham *v.* Davidson, 51 Cal. 352; Hoyt *v.* Sprague, 103 U. S. Supr. 613. But see Opinion of Justices, cited in 4 N. H. 572; Jones *v.* Perry, 10 Yerg. 59.

[3] Snowhill *v.* Snowhill, 2 Green Ch. 20.

[4] Brenham *v.* Davidson, 51 Cal. 352.

[5] Boon *v.* Bowers, 30 Miss. 246; Nelson *v.* Lee, 10 B. Monr. 495.

[6] Clarke *v.* Cordis, 4 Allen, 466.

[7] *Per curiam*, in Brenham *v.* Davidson, 51 Cal. 352. An act of the legislature cannot authorize a stranger, apart from guardianship, to sell an infant's land or other property as an individual, and so confer a good title, and certainly no act will be readily interpreted to mean this. The sale is supposed to be

CHAPTER V.

RIGHTS AND DUTIES OF GUARDIANS CONCERNING THE WARD'S PERSON.

§ 331. **Division of this Chapter.** — As the guardian of a minor stands in the place of a parent, *sub modo*, his rights and duties, so far as concerns the person of his ward, are to be considered correspondingly with those of a parent. His rights relate chiefly to the ward's personal custody. His duties are those of protection, education, and maintenance. These rights and duties will be considered at length in the present chapter.

§ 332. **Guardian's Right of Custody.** — Guardianship, generally, carries with it the custody of the ward's person. This is especially true where the ward's parents are both dead or incompetent to act, for natural guardians have the prior claim to custody while alive. Some one must exercise the right of custody of the infant when the natural protector is wanting; and who is more suitable than the officer invested by law with the responsibility of paying for the child's education and maintenance? Hence the guardian's title is, in this respect, higher than that of relatives and friends; and he may insist upon taking the child from the control of a stepmother or grandmother, or from any person to whom the father has informally committed the care.[1] For such considerations, however material in determining the selection of a guardian, become superseded by the actual appointment.

authorized as of one in the guardian or trust capacity, and to require or to respect his due appointment. Paty *v.* Smith, 50 Cal. 153; Lincoln *v.* Alexander, 52 Cal. 382. See further, *Ex parte* Atkinson, 40 Miss. 17, to the effect that under the former constitution of that State no probate guardian could be appointed over a child whose father was living.

[1] Coltman *v.* Hall, 31 Me. 196; Bounell *v.* Berryhill, 2 Cart. 613; Johns *v.* Emmert, 62 Ind. 533.

And it has been said that the decision of the court as to the guardian's appointment is a final decision as to the care and custody of the ward.[1]

But the custody of infants, as we have seen, is a subject within the free discretion of courts of equity; and where the interests of the ward require it, the care of his person will be committed to others.[2] Chancery jurisdiction applies in this respect to testamentary and chancery guardianship. The good of the child is superior to all other considerations. Of this the court will judge in each case by the circumstances, and make orders accordingly, both as to actual custody and as to the persons who may have access to the child. In determining where the infant shall reside, the infant's inclination shall have considerable weight, if he be of sufficient age; but not, it would appear, during the period of nurture.[3]

The right of chancery courts to regulate the personal custody of infants subject to probate guardianship has also been asserted in this country. This principle determined the decision of the court in the New York case of *People* v. *Wilcox*.[4] Here it appeared that the parents had separated, the father being a man of intemperate habits. The child, by the father's permission, was subsequently brought up at the house of his paternal grandparents. Upon the father's death, the grandparents secured letters of guardianship, without notice to the mother, who was resident elsewhere. She afterwards came forward and claimed control of her child, then only nine years old. It appeared that the child was happy and well provided for at the home of his grandparents. But it also appeared that the mother was a person of good character, and that no sufficient reason existed for depriving her of her natural offspring. The child was therefore taken from the legal guardian and his custody awarded to the mother.

But whatever might have been the language of the court

[1] Senseman's Appeal, 21 Penn. St. 331.

[2] Roach *v.* Garvin, 1 Ves. 160; Macphers. Inf. 119; Story Eq. Juris. § 1341; Ward *v.* Roper, 7 Humph. 111.

[3] Anon., 2 Ves. Sen. 374; Regina *v.* Clark, 40 E. L. & Eq. 109; People *v.* Wilcox, 22 Barb. 178; Bounell *v.* Berryhill, 2 Cart. 613; Rex *v.* Greenhill, 4 Ad. & El. 642; Garner *v.* Gordon, 41 Ind. 92. See *supra*, §§ 245–250, as to custody.

[4] 22 Barb. 178.

in this case, it is apparent that the circumstances were of a peculiar character. This decision turned not merely upon chancery powers. It recognized the deeper principle of natural law, that the relation of parent and child shall not be roughly severed. And thus we find probate guardianship in this country frequently limited by positive enactment, so as to reserve to the parents the natural control of their own children and the right to educate, when alive and competent to transact business.[1] As to probate guardians, it is to be added that the more natural course, so far at least as strangers and distant relatives are concerned, is, in controversies like the foregoing, to apply for the removal of the guardian already appointed, and for the appointment of another competent to take actual control of the ward's person.

§ 333. **Guardian's Right of Custody; Subject continued.**— The English cases are numerous where the mother's claim has been postponed to that of the testamentary or chancery guardian.[2] And where the mother clandestinely removes her child, the court has ordered him to be delivered up to the guardian.[3] So where she procures his marriage in violation of the statute.[4] And in a conflict between the mother and the infant's paternal relatives, pending the appointment of a chancery guardian, the court has given the *interim* custody to strangers.[5] But the court interferes with reluctance as against the mother, where no misconduct on her part appears, especially if the infant is of tender years or delicate constitution, and requires maternal care and nourishment. And Lord Eldon observed, in a case where the mother's rights came in conflict with those of the testamentary guardian, that though the effect of the appointment of a guardian is to commit the custody of the guardianship, the court looks with great anxiety to the execution of the duty belonging to the guardian, and the attention expected to be paid to the reasonable wishes of the natural parent.[6] As our former

[1] See Smith's Prob. Pract. 82, 87; Ramsay *v.* Ramsay, 20 Wis. 507.

[2] See Macphers. Inf. 119–121.

[3] Wright *v.* Naylor, 5 Madd. 77.

[4] Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 103; Gilb. Eq. 172.

[5] *In re* North, 11 Jur. 7. See Anderton *v.* Yates, 15 E. L. & Eq. 151.

[6] Earl of Ilchester's Case, 7 Ves. 380.

discussion of the subject of parental custody may have led the reader to infer, the American rule is not uniform in this respect; and as to testamentary and probate guardians, the widowed mother is in some States preferred to the guardian, while in others the guardian is preferred to the mother; the legislature frequently supplying the definite rule of guidance.[1]

Testamentary guardians cannot be controlled in their rights by expressions, in other parts of the will appointing them, which amount to a mere recommendation. A case of this sort came before Lord Chancellor Cottenham in 1847. The testator had appointed testamentary guardians over his children in due form, but had further expressed the wish that in case of his wife's death during their minority they should be placed under the care of certain female relatives. The wife having died, the female relatives desired to assume full control. The Lord Chancellor refused to accede to this extent; but, upon his suggestion, an arrangement was effected, satisfactory to all parties, so as to give the immediate custody to the relatives, while preserving to the testamentary guardian that general control and superintendence which it was his duty to exercise under the will.[2]

Chancery will grant access in certain cases while awarding the custody of the infant to other persons. Not only have orders of access been made in the mother's favor, but, after her death, access has been allowed to her representatives.[3] And where Lord Hardwicke appointed a grandmother guardian in preference to the father's executor, he ordered that the latter should have free access to the infants.[4] So in a Georgia case the court, while confirming the guardian's right of custody, allowed access to a near relative on her request.[5]

Where, too, a decree of divorce gives the right of access to

[1] Lord *v.* Hough, 37 Cal. 657; Ramsay *v.* Ramsay, 20 Wis. 507; *contra*, Macready *v.* Wilcox, 33 Conn. 321. And see Peacock *v.* Peacock, 61 Me. 211.

[2] Knott *v.* Cotter, 2 Ph. 192.

[3] Ord *v.* Blackett, 9 Mod. 116; Macphers. Inf. 120.

[4] Hunter *v.* Macrae, 17 Oct. 1738; cited in Macphers. Inf. 121.

[5] *Ex parte* Ralston, 1 R. M. Charlt. 119.

a certain parent, not even a testamentary guardian can refuse obedience.[1]

Proceedings on a writ of *habeas corpus* may determine the question of legal custody. But a child in the personal keeping of his guardian is in legal custody; nor can unlawful imprisonment or restraint be imputed from the guardian's refusal to surrender such child to the parent.[2] On the other hand, the court cannot entertain *habeas corpus* to restore to the guardian a child forcibly removed by the parent, unless the child is actually restrained of liberty.[3] Besides the writ of *habeas corpus*, there is a remedy by petition to the court of chancery.[4]

§ 334. **Guardian's Right to change Ward's Domicile or Residence.** — The question whether the guardian may change the ward's domicile from one country or State to another has given rise to much discussion. In England, it was decided in the early part of this century that the surviving parent, being also the guardian, was competent to do so.[5] The case came before Sir William Grant, and was argued by counsel with great learning and ability. It was here shown that the best Continental jurists supported these views; among them, Voet, Rodenburgh, Bynkershoek, and Pothier. This is the leading case on the subject, and its authority has been fully recognized in the United States.[6] The great objection to a change of the infant's domicile is that the right of succession to personal property may be thereby affected; and it seems probable that, if the change is made with fraudulent intent, to the ward's injury or the custodian's private advantage, it will not be sustained. Moreover, as the case above referred to was that of a parent, it has been doubted whether a guardian, as such, not being a parent, has the right to change his

[1] Hill *v.* Hill, 49 Md. 450.

[2] People *v.* Wilcox, 22 Barb. 178; Townsend *v.* Kendall, 4 Minn. 412; *In re* Andrews, L. R. 8 Q. B. 153. The guardian's assent to a temporary custody does not conclude him. Commonwealth *v.* Reed, 55 Penn. St. 425.

[3] Foster *v.* Alston, 6 How. (Miss.) 406.

[4] Story Eq. Juris. § 1340, and cases cited; and as to custody in general, see *supra*, §§ 245–250. As to statute procedure for custody, see Peacock *v.* Peacock, 61 Me. 211.

[5] Potinger *v.* Wightman, 3 Mer. 67. And see preceding chapter.

[6] Holyoke *v.* Haskins, 5 Pick. 20; 2 Kent Com. 227, *n.*

ward's domicile. In Pennsylvania, the guardian's authority has been denied, and the power confined to the parents.[1] But Chancellor Kent expresses dissatisfaction with such a doctrine, and considers the objection against the guardian's power too refined and speculative.[2] The other American authorities sustain this view, though in general assuming the principle, rather than asserting it, and not without some bias as to the particular consequences resulting.[3] The question does not seem to have been raised in England. With the facilities of modern travel and the liberal intercourse of nations, the tendency increases in favor of the guardian's power to change in good faith his ward's residence, if not the domicile, even though not endowed with parental authority. This principle is the more readily admitted, so far as different counties in the same State are concerned.[4] And it would be unwise for American courts to apply, as between States united under one general government, the same rigidly exclusive doctrines which foreign countries differing in religion, customs, and civil institutions, may see fit to adopt in their intercourse with one another. For such a change might be for the direct benefit of the ward's health, education, or personal surroundings.

The English Chancery Court reluctantly permits its wards to be carried out of the national jurisdiction. The Chancellor in *De Manneville* v. *De Manneville* restrained a father, himself an alien, from removing his child to a foreign country.[5] In other cases, permission has been granted under

[1] School Directors *v.* James, 2 Watts & Serg. 568; and see Story Confl. Laws, §§ 494, 504.

[2] 2 Kent Com. 227, *n.* (*c*), where this subject is fully discussed.

[3] Where clearly disadvantageous to the ward and the ward's kindred and connections, this right is not favored. The guardian's right to change the domicile is denied where such change affects the ward's testamentary capacity. Daniel *v.* Hill, 52 Ala. 430. Or where he sent the ward away to prevent a marriage against his wishes, such marriage not being an objectionable one. Wynn *v.* Bryce, 59 Ga. 529.

[4] *Ex parte* Bartlett, 4 Bradf. 221. But the guardian's intention to change the ward's domicile, especially in the case of a very young child, is not to be presumed. Marheineke *v.* Grothaus, 72 Mo. 204. Here the question arose as to whether, the guardian having died, a successor in the trust was to be appointed in a different county; which would have been disadvantageous to the ward.

[5] 10 Ves. 52. See Dawson *v.* Jay, 27 E. L. & Eq. 451.

stipulations for the benefit of the child; the guardian being required to transmit regular returns to the court with vouchers, and to bring back the ward within a specified time.[1] Similar orders in chancery have been made in this country, though rarely.[2]

§ 335. **Right to Personal Services of Ward; to recover Damages; Other Rights.** — The guardian has not the same right as a father to the personal services of the infant. For as his duty to educate and maintain is limited by law to the ward's resources, and is not, like the responsibility of a parent, absolute, so his rights are those of a representative, who should seek to add to the trust fund in his hands, and not to his own private emolument.[3]

By the common law, the guardian could maintain an action of trespass and recover damages for his ward; and the statute of Westminster II. c. 32, gave a writ of ravishment, by means of which he could recover the body of the heir as well as damages.[4] The equity of this statute may perhaps extend to testamentary, chancery, and probate guardians, as well as to guardians in socage; on which principle it has been held that the guardian may sue and recover damages for the seduction of his female ward.[5]

The guardian, acting *in loco parentis*, may bind out his

[1] Jeffreys *v.* Vanteswartsworth, Barn. 141; Jackson *v.* Hankey, Jac. 265, *n.*; Stephens *v.* James, 1 M. & K. 627; Lethem *v.* Hall, 7 Sim. 141; Talbot *v.* Earl of Shrewsbury, 18 L. J. 125. See Macphers. Inf. 129–132.

[2] *Ex parte* Martin, 2 Hill Eq. 71. Lord Chancellor Cottenham has observed, on this subject, that while circumstances may occur, such as the ill-health of the ward, so as to render his removal necessary, the general rule ought to be against permitting an infant ward to be taken out of the jurisdiction. He further declared his regret that this rule had not been more strictly adhered to, and his conviction that a permanent residence abroad was injurious to the future prospects of English children, inasmuch as they were thus deprived of their religious opportunities, separated from their natural connections, estranged from the members of their own families, withdrawn from those courses of education which their contemporaries were pursuing, and accustomed to habits and manners which were not those of their own country, and were constantly becoming from day to day less and less adapted to the position which they should afterwards occupy in their native land. Campbell *v.* Mackay, 2 M. & C. 31.

[3] See Bass *v.* Cook, 4 Port. 390; Bouv. Dict. "Guardian;" Bannister *v.* Bannister, 44 Vt. 624.

[4] Bac. Abr. Guardian (F).

[5] Fernslee *v.* Moyer, 3 Watts & Serg. 416.

ward as an apprentice whenever the father could do so. This, however, is a matter almost exclusively of statute regulation. And, while the father is usually held liable in damages for his son's breach of contract, it would seem that the guardian is not personally responsible for his ward unless the statute makes him so.[1]

As the guardian is bound to promote the moral welfare of the person entrusted to his care, he may warn off from the ward's premises any persons improper for him to associate with, and, if necessary, expel them forcibly. This right is to be reasonably construed; and in the use of means and the amount of force necessary to effect his object, he is allowed a liberal discretion, such as a parent might exercise under like circumstances.[2] And in many other respects the rights of a guardian resemble closely those of a parent.[3]

§ 336. **Guardian's Duties as to Ward's Person; in General.** — The guardian's duties as to the ward's person are those of protection, education, and maintenance. In exercising them, he is bound to regard the ward's best interests. Guardians, as we have seen, are seldom appointed where there is not some property. But even though the ward be penniless, we are not to suppose that one vested with the full right of custody can neglect with impunity those offices of tenderness which common charity as well as parental affection suggest. For to the orphan he stands in some sense in the place of a parent, and supplies that watchfulness, care, and discipline which are essential to the young in the formation of their habits, and of which being deprived altogether, they would better die than live.

§ 337. **Liability for Support of Ward.** — It is, however, to be always borne in mind that while the father is bound to educate and maintain his children absolutely and from his

[1] Velde *v.* Levering, 2 Rawle, 269.

[2] Wood *v.* Gale, 10 N. H. 247.

[3] Insane persons and spendthrifts cannot manifestly be subjected to the same personal restraint and custody as infants. But the fact that such ward occupies his own house affords him no special immunity against his guardian. Accordingly, it has been held that the guardian of a spendthrift may enter the dwelling-house of the latter, in the performance of official duties, without his permission and against his will. State *v.* Hyde, 29 Conn. 564.

own means, no such pecuniary responsibility is imposed upon a guardian who is not the parent. The latter, by virtue merely of such trust, need only use for that purpose the ward's fortunes. Hence, in supplying the wants of his wards, he is to consider, not the style of life to which they have been accustomed, so much as the income of their estate at his disposal. Whatever their social rank may have been, he may, provided they are left destitute, place them at work, or, if they are too young or feeble, surrender them to some charitable institution. He should, however, act with delicacy and prudence; he may properly consider in this connection the habits and tastes of the children and the wishes of their relatives; and he can relieve himself of responsibility by asking judicial guidance. The courts show a liberal disposition to protect the guardian from personal liability on account of his ward. And if a guardian has permitted the ward, at his own cost, to remain in the care and custody of another, without express contract as to the period of time, he may, whenever he pleases, terminate his personal liability by giving notice. Nor does it affect the case that his ward is then too sick to be removed.[1]

But if the income of the ward's estate is ample for payment of the necessaries supplied him, the creditors may, by a proper course of procedure, have it subjected to the satisfaction of their just claims. And this too, it would appear, notwithstanding any personal undertaking on the guardian's part.[2] Not even funds derived from a minor's pension, granted under the United States laws, are exempt from liability for the ward's support.[3]

On the other hand, the guardian may make himself liable for his ward whenever he chooses to do so, like any one else *in loco parentis*. And if a guardian contracts with another to

[1] Spring *v.* Woodworth, 4 Allen, 326; Overton *v.* Beavers, 19 Ark. 623; Bredin *v.* Dwen, 2 Watts, 95; Hussey *v.* Roundtree, Busb. 110; Gwaltney *v.* Cannon, 31 Ind. 227; McDaniel *v.* Mann, 25 Tex. 101; Ford *v.* Miller, 18 La. Ann. 571.

[2] Barnum *v.* Frost, 17 Gratt. 398; Walker *v.* Browne, 3 Bush, 686. Suit on the probate bond by permission of court is the common remedy in many States. Cole *v.* Eaton, 8 Cush. 587.

[3] Welch *v.* Burris, 29 Iowa, 186.

support his ward, he may become personally bound by his failure to limit the right for indemnity to the estate in his hands.[1]

For necessaries of his ward, supplied by the guardian's order and on his credit, the guardian then is liable; and this on the principle to be noticed hereafter, that the guardian has made a contract. He is of course entitled to reimbursement for the necessaries thus supplied by himself from the ward's estate. So, where he advances money for the ward's maintenance and education.[2] On the ward's own contract for necessaries, the guardian is not personally liable. And it would appear from some cases that his knowledge of the ward's contract and failure to dissent will not suffice; in other words, that an express contract should be shown to charge the guardian personally. Yet such a contract of the ward may be ratified by the words or acts of a guardian; and we presume that he may generally be held bound on a contract shown by strong implication to have existed between him and the party furnishing education or support.[3] As a rule the guardian, if custodian of the ward's person, has the same right to judge as to what are necessaries, according to the estate and social position of his ward, that a parent would

[1] See Lewis *v.* Edwards, 44 Md. 333, as to offsets for the services of the ward to one who sues the guardian for his board. On the principle of the text, a case in Vermont was decided a few years ago. The guardian had contracted for the board of his ward, at a dollar and a half a week, fixing no limitation as to time. The person furnishing the board afterwards notified him that he should raise the price to two dollars a week, and that if this was not satisfactory the ward must be taken away. The guardian did not take the ward away, nor on the other hand did he expressly accede to the new contract. But the court inferred from the circumstances that he had made himself personally liable for the increased rate. It was observed in this case that the guardian has the possession and control of the ward's estate, for his support and maintenance, and has the power of indemnifying himself for any contracts he may make; that it is his business to know the amount and situation of the estate, and that he is not obliged to incur any liability beyond it. If he do so it is his own fault, for which others, who cannot be so well possessed of this knowledge, ought not to suffer. But the court also held that under the above contract the guardian was not personally liable for extra charges against the ward, such as repairs on clothing, washing, care and medical attendance while sick, and burial expenses. Hutchinson *v.* Hutchinson, 19 Vt. 437.

[2] Smith's Appeal, 30 Penn. St. 397; Rollins *v.* Marsh, 128 Mass. 116; *infra*, c. 6.

[3] Tucker *v.* McKee, 1 Bailey, 344; Hargrove *v.* Webb, 27 Ga. 172; Oliver *v.* Houdlet, 13 Mass. 237.

have for his own child;[1] and others who supply the minor are bound to take heed accordingly.[2] It is held that the guardian appointed in one State may sue a foreign guardian for the support and education of wards left with the former by consent of the latter guardian.[3] So wherever a town is liable for the support of a ward as a pauper, his guardian may claim reimbursement for necessary expenses incurred after the ward's property has been exhausted.[4] A guardian is presumed to furnish all necessaries for his infant ward, and a stranger who furnishes them must in general contract with the guardian himself.[5] But where the guardian makes purchases, the party furnishing the goods is not bound to see that payment is made from the ward's income. This risk must be run by the guardian himself, for the facts are within his own peculiar knowledge.[6]

§ 338. **Same Subject; Using Income or Capital, &c.** — The doctrine has been repeatedly declared that no guardian can expend more than the income of his ward's estate without proper judicial sanction. This is the settled rule in chancery, and it is universally applicable in the United States.[7] And a similar principle prevails under the civil law.[8] But to what extent the guardian renders himself personally liable, by exceeding the income without previous sanction of the court, is not quite clear. The English rule is undoubtedly strict. But as to probate guardians, and in modern practice, legal formalities have been considerably relaxed. In most of the United States the guardian is, doubtless, justified in breaking the principal fund, under strong circumstances of necessity, for the benefit of his ward, and he may leave his conduct to the subsequent approval of the court when he presents his ac-

[1] Nicholson *v.* Spencer, 11 Ga. 607; Kraker *v.* Byrum, 13 Rich. 163.

[2] McKanna *v.* Merry, 61 Ill. 177.

[3] Spring *v.* Woodworth, 2 Allen, 206.

[4] Fisk *v.* Lincoln, 19 Pick. 473. See Preble *v.* Longfellow, 48 Me. 279.

[5] State *v.* Cook, 12 Ired. 67; Royston *v.* Royston, 29 Ga. 82.

[6] Broadus *v.* Rosson, 3 Leigh, 12; Hutchinson *v.* Hutchinson, 19 Vt. 437.

[7] *In re* Bostwick, 4 Johns. Ch. 100; Myers *v.* Wade, 6 Rand. 444; 2 J. J. Marsh. 403; Villard *v.* Chovin, 2 Strobh, Eq. 40; State *v.* Clark, 16 Ind. 97; Beeler *v.* Dunn, 3 Head, 87.

[8] Payne *v.* Scott, 14 La. Ann. 760.

counts. In cases of risk and uncertainty, however, the proper course is to obtain a previous order.[1]

The order in which the ward's property should be expended for his support and education is as follows: first, the income of the property; next, if that proves insufficient, the principal of personal property; lastly, if both are inadequate, the ward's real estate, or so much of it as may be necessary. The ward's real estate can never be sold, except under a previous order of court. Nor can a guardian use, in maintaining his ward, the proceeds of real estate sold for the purpose of reinvestment only, any more than he could have used the real estate itself. He should ask to sell for the purpose of maintenance.[2]

In some cases, it becomes both reasonable and necessary to exceed the ward's income. Thus courts of chancery authorize the capital to be broken upon, where the property is small and the income inadequate for support.[3] As where the ward's education is nearly completed, especially if he will thereby be fitted for a profession. Or where the ward is mentally or physically unfit to be bound out as an apprentice.[4] So, too, in case of extreme sickness, or other emergency, where an unusual outlay becomes necessary.[5] And the guardian can anticipate the income of one year in supplying the casual deficiency of another.[6] And he may treat an increase of value in his ward's property as income.[7] And he may use the accumulated profits of previous years where necessary. A young lady who is a ward may be

[1] Story Eq. Juris. § 1355; Chapline *v.* Moore, 7 Monr. 150; Davis *v.* Harkness, 1 Gilm. 173; Davis *v.* Roberts, 1 Sm. & M. Ch. 543; Royston *v.* Royston, 29 Ga. 82; Foteaux *v.* Lepage, 6 Clarke (Iowa), 123; Gilbert *v.* McEachen, 38 Miss. 469; Phillips *v.* Davis, 2 Sneed, 520; Cummins *v.* Cummins, 29 Ill. 452; Cohen *v.* Shyer, 1 Tenn. Ch. 192.

[2] Strong *v.* Moe, 8 Allen, 125; Rinker *v.* Street, 33 Gratt. 663. See St. Joseph's Academy *v.* Augustine, 55 Ala. 493.

[3] McDowell *v.* Caldwell, 2 McC. Ch. 43; Farrance *v.* Viley, 9 E. L. & Eq. 219; Roseborough *v.* Roseborough, 3 Baxt. 314.

[4] Johnston *v.* Coleman, 3 Jones Eq. 290.

[5] Long *v.* Norcom, 2 Ired. Eq. 354; *In re* Clark, 17 E. L. & Eq. 599.

[6] Carmichael *v.* Wilson, 3 Moll. 87; Bybee *v.* Tharp, 4 B. Monr. 313.

[7] Long *v.* Norcom, 2 Ired. Eq. 354; Macphers. Inf. 337, 338.

allowed small sums by way of spending-money for her personal needs, apart from what may be actually necessary to eat and wear.[1] In short, the guardian is allowed a liberal discretion in expenditures for maintenance and education, so long as he refrains from enroaching upon the ward's capital.[2] And it is held that he is limited in his disbursements, not to the income of the ward's estate actually in his hands, but to the income of the ward's estate wherever situated.[3]

§ 339. **Allowance to Parent for Ward's Support; Chancery Rules.** — As the father is bound to support his own children, he cannot, when guardian, claim the right to use the income of their property for that purpose; much less to disturb the principal. But, as we have seen, a father is allowed, when his means are small, to claim assistance from their fortunes, to bring them up in becoming style. And where the father, when acting as guardian for his own children, might have reimbursed himself, any other person, as guardian, may help him; rather, however, for the future than for the past.[4]

[1] Karney *v.* Vale, 56 Ind. 542.

[2] Brown *v.* Mullins, 24 Miss. 204; Speer *v.* Tinsley, 55 Ga. 89.

[3] Foreman *v.* Murray, 7 Leigh, 412; Maclin *v.* Smith, 2 Ired. Eq. 371. And see *In re* Coe's Trust, 4 K. & J. 199.

[4] Macphers. Inf. 219; Clark *v.* Montgomery, 23 Barb. 464; Beasley *v.* Watson, 41 Ala. 234; Welch *v.* Burris, 29 Iowa, 186; Myers *v.* Wade, 6 Rand. 444; Walker *v.* Crowder, 2 Ired. Eq. 478. See *supra*, §§ 237–240. As to parents, and those like a stepfather who choose to stand in place of a parent, the rules of maintenance which have already been stated apply as to such allowances, in a guardian's accounts. If the guardian, or the person with whose claim he charges himself, was of adequate means and bound legally to maintain the child as parent or fully undertook to supply the place of parent, education and support cannot generally be allowed from the ward's estate. Bradford *v.* Bodfish, 39 Iowa, 681; Douglas's Appeal, 82 Penn. St. 169. The expense of past maintenance is the less readily allowable. Folger *v.* Heidel, 60 Mo. 284. Yet future maintenance is chargeable where the ward's means were disproportionate to the parent's and needful to provide in suitable style; and even past maintenance may be thus allowed. *Supra*, Part III. c. 2. And if one in place of parent has undertaken the function upon some such proviso, the ward's income may be used. The circumstances may always be considered, and the proportionate means as between the ward and the person fulfilling the parental functions. Voessing *v.* Voessing, 4 Redf. 360. The ward's personal service, if of value, is a proper credit in allowing for maintenance. Starling *v.* Balkum, 47 Ala. 314. The guardian of an insane ward may properly charge for the expense of boarding the ward at an insane asylum; the ward's estate being sufficient for such expenditure. Corcoran *v.* Allen, 11 R. I. 567.

The allowance of money for the maintenance and education of infants constitutes an important branch of the English as contrasted with our American chancery jurisprudence. Generally speaking, whenever application is made for the appointment of a chancery guardian, maintenance is also applied for; and the guardian receives no more than the annual sum fixed by the court. The ward's whole fortune is held at the disposal of the court, whether the infant was made a ward by suit or otherwise. If a suit be pending, the guardian receives his allowance through the receiver or some other officer of the court. If there be no suit pending, the executor or trustee pays the annual sum fixed by the court; and, if the whole proceeds of real estate be ordered for maintenance, the tenants are safe in attorning to the guardian. But parties making payment are discharged only to the extent of the allowance decreed.[1]

Testamentary guardians are, however, frequently authorized by the testator to apply at discretion from the income of the infant's fund, or from the capital, for his support; and such discretion will not be controlled so long as the guardian acts in good faith. But trustees and guardians frequently procure an order of maintenance, notwithstanding, in order to relieve themselves of all responsibility.[2] Doubts were formerly entertained of the power of chancery to interfere in these and other cases where the infant had not been made a ward of chancery by suit. No such doubts now exist, however; and the court will, on petition, and without formal proceedings by bill, settle a due maintenance.[3]

[1] Macphers. Inf. 106; *Ex parte* Starkie, 3 Sim. 339. Chancery will control the discretion of trustees as to allowance. *In re* Hodges, L. R. 7 Ch. D. 754.

[2] Macphers. Inf. 213; Livesey *v.* Harding, Taml. 460; French *v.* Davidson, 3 Madd. 396; Collins *v.* Vining, 1 C. P. Cooper, 472. In Mississippi the sum for maintenance and education must be fixed in chancery. Dalton *v.* Jones, 51 Miss. 585. But as to personal estate, the American rule is usually, that if the court would have authorized the expenditure upon application before it was made, the expenditure will be sanctioned upon settlement of the guardian's accounts. Rinker *v.* Streit, 33 Gratt. 663.

[3] Story Eq. Juris. § 1354, and cases cited. And see Kettletas *v.* Gardner, 1 Paige, 488.

Trustees may be authorized by the terms of the trust to expend a certain sum for maintenance and support of children. It is generally understood

§ 340. **Secular and Religious Education of Ward by Guardian.** — Courts of chancery treat the guardian as the proper judge of the place where his ward shall be educated, and will, if necessary, issue orders to compel obedience. But if guardians disagree as to the mode of their ward's education, the court will exercise its own discretion and will not consider itself bound by the wishes of the majority.[1] Parol evidence of the deceased father's wishes is admissible, and the court will pay attention to such wishes, although informally expressed, in judging of the mode of education of children as well as in the appointing of a guardian.[2]

The subject of a child's religious education received much consideration in a late English case, where, notwithstanding the father's directions in his will appointing a testamentary guardian who was, like himself, a Roman Catholic, a daughter nine years old was allowed to remain with her mother, a Protestant, and to be brought up in the same religious faith; and this against the guardian's wishes, tardily expressed. An antenuptial agreement, made between the husband and wife, stipulating that boys of the marriage should be educated in the religion of the father, and girls in that of the mother, was indeed declared of no binding force as a contract; and yet it was added that this agreement would have weight with the court in considering, after the father's death, whether he had abandoned his right to educate this daughter in his own religion. The welfare of the child was, under the circumstances, deemed a very important consideration.[3]

that the expenses of education are thus included. Breed's Will, 1 Ch. D. 226. Trustees under a will thus authorized, and in effect testamentary guardians, are not compelled to pay over such moneys to a statute or probate guardian. Capps *v.* Hickman, 97 Ill. 429.

[1] Story Eq. Juris. § 1340; Macphers. Inf. 121; Tremain's Case, Stra. 168; Hall *v.* Hall, 3 Atk. 721.

[2] Anon., 2 Ves. Sen. 56; Campbell *v.* Mackay, 2 M. & C. 34; *contra*, Storke *v.* Storke, 3 P. Wms. 51.

[3] Andrews *v.* Salt, L. R. 3 Ch. 622. See *In re* Newbery, L. R. 1 Ch. 263, where the deceased father's wishes prevailed, as against the mother and the children, so that the minor children might not be taken to worship at a chapel of the "Plymouth Brethren." And see *In re* Agar-Ellis, 27 W. R. 117; *supra*, Part III. c. 2, where the general subject of a child's education and maintenance is discussed.

CHAPTER VI.

RIGHTS AND DUTIES OF THE GUARDIAN AS TO THE WARD'S ESTATE.

§ 341. **In General; Leading Principles.** — We have seen that chancery guardians have only a limited authority over the estates of their wards, inasmuch as the court makes a fixed allowance, to be consumed in maintenance and education, leaving the bulk of the infant's estate in the hands of executors, trustees, or its own officers. In this country guardians almost invariably assume the full management of their ward's fortunes, unless restrained by the will of the testator; and whenever they do so they are bound by the principles which regulate the general conduct of all trustees.

The leading principle recognized by chancery in supervising the guardian's conduct is, that the ward's interests are of paramount consideration. Hence, two observations are to be made at the outset of this chapter. The first is, that unauthorized acts of the guardian may be sanctioned if they redound to the ward's benefit; while, on the other hand, for unauthorized acts by which the ward's estate suffers, the guardian must pay the penalty of his imprudence.[1] The second is, that the guardian's trust is one of obligation and duty, and not of speculation and profit.[2] We shall have occasion to apply these observations as we proceed.

§ 342. **Guardian's General Powers and Duties as to Ward's Estate.** — Among the most obvious powers and duties of the guardian in the management of his ward's property are these: To collect all dues and give receipts for the same. To procure such legacies and distributive shares from testators or

[1] Milner *v.* Lord Harewood, 18 Ves. Jr. 259; Capehart *v.* Huey, 1 Hill Ch. 405.
[2] 2 Kent Com. 229.

others as may have accrued. To take and hold all property settled upon the ward by way of gift or purchase, unless some trustee is interposed. To collect dividends and interest, and the income of personal property in general. To receive and receipt for the rents and profits of real estate. To receive moneys due the ward on bond and mortgage. To pay the necessary expenses of the ward's personal protection, education and support. To invest and reinvest all balances in his hands. To sell the capital of the ward's property, change the character of investments when needful, convert real into personal and personal into real estate, in a suitable exigency ; but not without judicial direction. To account to the ward or his legal representatives at the expiration of his trust. And, in general, to exercise the same prudence and foresight which a good business man would use in the management of his own fortunes, though under more guarded restraints.[1]

§ 343. **Right to sue and arbitrate as to Ward's Estate.** — The right to collect a debt implies the right to sue. Hence, the guardian may, in the exercise of good discretion, and acting, if need be, under competent legal advice, institute suits to recover the ward's property.[2] And this right extends to property fraudulently obtained from the ward before the guardian's appointment.[3] But he must sue in general in the name of his ward (except under qualifications to be noticed), and not in his own name.[4] And if he institutes groundless and speculative suits, and is unsuccessful, or occasions a controversy over his accounts through his own fault, he must bear the loss. So, too, whenever his conduct shows fraud or heedless imprudence.[5] Otherwise, he is entitled to his costs and legal expenses out of the ward's estate.[6] The

[1] Genet *v.* Tallmadge, 1 Johns. Ch. 3; Jackson *v.* Sears, 10 Johns. 435; Eichelberger's Appeal, 4 Watts, 84; Swan *v.* Dent, 2 Md. Ch. 111; Crenshaw *v.* Crenshaw, 4 Rich. Eq. 14; Chapman *v.* Tibbits, 33 N. Y. 289.

[2] Smith *v.* Bean, 8 N. H. 15; Shepherd *v.* Evans, 9 Ind. 260; Southwestern R. *v.* Chapman, 46 Ga. 557.

[3] Somes *v.* Skinner, 16 Mass. 348.

[4] Longstreet *v.* Tilton, Coxe, 38; Sillings *v.* Bumgardner, 9 Gratt. 273; Vincent *v.* Starks, 45 Wis. 458.

[5] Brown *v.* Brown, 5 E. L. & Eq. 567; Savage *v.* Dickson, 16 Ala. 257; Blake *v.* Pegram, 109 Mass. 541; Spelman *v.* Terry, 74 N. Y. 448.

[6] *Re* Flinn, 31 N. J. Eq. 640.

rule in many States now is that the guardian sues and is to be sued upon his own express contract touching the ward's estate. And in various instances he may appear and make defence for the ward. But in other States the older rule of the English chancery is followed, which required a guardian *ad litem* to make defence, the infant being the party sued.[1]

[1] Taylor *v.* Kilgore, 33 Ala. 214; 1 Foster (N. H.), 204. Among the cases in which the guardian has been allowed to sue in his own name are the following: For non-payment of rent. Pond *v.* Curtiss, 7 Wend. 45. For trespass on his ward's lands. Truss *v.* Old, 6 Rand. 556; Bacon *v.* Taylor, Kirby, 368. For intermeddling with the issues and profits thereof. Beecher *v.* Crouse, 19 Wend. 306. For an injury to any property of the ward in his actual possession. Fuqua *v.* Hunt, 1 Ala. 197. Or where he has the right of possession. Sutherland *v.* Goff, 5 Porter, 508; Field *v.* Lucas, 21 Ga. 447. Or on a note payable to himself, as guardian, though given for a debt due to the ward. Jolliffe *v.* Higgins, 6 Munf. 3; Baker *v.* Ormsby, 4 Scam. 325; Thacher *v.* Dinsmore, 5 Mass. 299; Hightower *v.* Maull, 50 Ala. 495. Or, as it would appear, on his express contract touching the ward's estate. Thomas *v.* Bennett, 56 Barb. 197.

But debts and demands of the ward should in general be prosecuted in the ward's name. And the guardian cannot sue in his own name, after his female ward's marriage, for a debt due her before such marriage. Barnet *v.* Commonwealth, 4 J. J. Marsh. 389. Nor on a promise to the guardians of the minor children of A. B.; for this is a promise to the wards. Carskadden *v.* McGhee, 7 Watts & Serg. 140. Nor on an award, although he had submitted to arbitration. Hutchins *v.* Johnson, 12 Conn. 376. Nor where a statute authorizes guardians to "demand, sue for, and receive all debts due" their wards. Hutchins *v.* Dresser, 26 Me. 76. And see Hoare *v.* Harris, 11 Ill. 24; Fox *v.* Minor, 32 Cal. 111. He cannot act on a petition for partition. Stratton's Case, 1 Johns. 509; Totten's Appeal, 46 Penn. St. 301. Nor subscribe a libel for divorce. Winslow *v.* Winslow, 7 Mass. 96. He is sometimes authorized by statute, however, to sue in his own name for the use of the ward. Fuqua *v.* Hunt, 1 Ala. 197; Longmire *v.* Pilkington, 37 Ala. 296; Mebane *v.* Mebane, 66 N. C. 334. And see Anderson *v.* Watson, 3 Met. (Ky.) 509; Hines *v.* Mullins, 25 Ga. 696. A guardian in Georgia must be party in an action to recover a legacy bequeathed to his deceased ward. Beavers *v.* Brewster, 62 Ga. 574. Guardian for minor heirs allowed, in Texas, to sue on a promissory note payable to the ancestor, on showing that they are the only heirs, and that there has been no administration. Roberts *v.* Sacra, 38 Tex. 580. *Sed qu.* For unlawful detainer, and *semble* in all suits by guardian for the benefit of the ward, the action should be entitled in the ward's name *by* guardian. Vincent *v.* Starks, 45 Wis. 458. A general guardian may sue in his own name to recover an infant's distributive share; and separate suits where there are several infants so entitled. Hauenstein *v.* Kull, 59 How. Pr. 24. Cf. Jordan *v.* Donahue, 12 R. I. 199, and cases cited. And see Ankeny *v.* Blackiston, 7 Or. 407. As to procedure in West Virginia, see Burdett *v.* Cain, 8 W. Va. 282. In Illinois the probate or statute guardian cannot bring suits in relation to his ward's real estate, such as ejectment. Muller *v.* Benner, 69 Ill. 108.

Payment by the debtor to an unauthorized person cannot avail in defence against the guardian's suit; but as to the defence of payment to the natural

A guardian is now generally permitted to submit to arbitration questions and controversies respecting the property and interests of his ward, and the award made in pursuance thereof is binding on all parties.[1] So he may compromise when acting in good faith and sound discretion for the benefit of his ward. But the guardian's compromise of a baseless and unjust claim would not be upheld in equity as against the ward, nor, as it would seem, against the guardian himself, no blame attaching to the latter.[2] An infant cannot, in any event, be bound by the fraudulent compromise of his guardian.[3] On the same general principles, and with like limitations, the guardian may release a debt due his ward, or

guardian, cf. *supra*, § 255; also Southwestern R. *v.* Chapman, 46 Ga. 557.

The right of action upon a note payable to a guardian for money of the ward passes, upon the guardian's death, to his personal representative. Chitwood *v.* Cromwell, 12 Heisk. 658. And so in general where he might, if alive, have sued in his own name. *Ib.*

A guardian is to be sued in person upon notes executed by him in his official capacity. See 1 Pars. Bills & Notes, 89, 90; Thacher *v.* Dinsmore, 5 Mass. 299.

A guardian is not liable in assumpsit for necessaries. Cole *v.* Eaton, 8 Cush. 587. Nor for labor performed on the ward's buildings. Robinson *v.* Hersey, 60 Me. 225. But he may be sued upon his own contract touching his ward's estate. Stevenson *v.* Bruce, 10 Ind. 397. And judgment should then be against him personally, and not against the ward. Clark *v.* Casler, 1 Cart. (Ind.) 243. Where the judgment is to bind the ward's property, suit should be against the ward. Otherwise, the property of the guardian must be levied upon, who will look to the infant's estate for his own reimbursement. Tobin *v.* Addison, 2 Strobh. 3; Clark *v.* Casler, 1 Smith (Ind.), 150. And see Raymond *v.* Sawyer, 37 Me. 406. As to conclusiveness of judgments, see Morris *v.* Garrison, 27 Penn. St. 226. Judgment against a person as "guardian," is a judgment against him personally, the additional words being descriptive merely. No action lies against a guardian upon the ward's contracts or debts; but suit should be against the ward, who may defend by guardian. Brown *v.* Chase, 4 Mass. 439; Willard *v.* Fairbanks, 8 R. I. 1. In dower and partition proceedings a guardian may appear for the ward, like any guardian *ad litem*, in some States. Rankin *v.* Kemp, 21 Ohio St. 651; Cowan *v.* Anderson, 7 Cold. 284. In Massachusetts, a ward's money may be reached by trustee process against him or taken on execution. Simmons *v.* Almy, 100 Mass 239. In a suit against A. B. the words "as he is guardian," &c., may be rejected as surplusage. Rollins *v.* Marsh, 128 Mass. 116.

Guardian and insane ward cannot be sued jointly to recover a debt which the ward incurred previous to the guardian's appointment. Allen *v.* Hoppin, 9 R. I. 258.

[1] Weed *v.* Ellis, 3 Caines, 253; Weston *v.* Stewart, 11 Me. 326; Hutchins *v.* Johnson, 12 Conn. 376; Goleman *v.* Turner, 14 S. & M. 118; Strong *v.* Beroujon, 18 Ala. 168.

[2] Underwood *v.* Brockman, 4 Dana, 309.

[3] Lunday *v.* Thomas, 26 Ga. 537.

cause of action for damages.[1] The same rule as to compounding and releasing debts appears to prevail in England as in this country; and it applies to all trustees alike.[2] The original doctrine seems to be this: that he cannot bind his ward by arbitration unless the court shall previously authorize him to do so, or subsequently approve, on the ground that it was for the ward's benefit.[3]

§ 344. **Whether Guardian can bind Ward's Estate by his Contracts.** — A guardian, it is said, cannot by his general contracts bind the person or estate of his ward.[4] Nor can he avoid a beneficial contract made by his infant ward.[5] Nor waive a benefit to which the ward is entitled by decree.[6] For any thing which he does injurious to the infant is a violation of duty, and the insertion, in a contract, of words importing the title "guardian" will not shield the guardian from personal liability. In the language of Chief Justice Parsons: "As an administrator cannot by his promise bind the estate of the intestate, so neither can the guardian by his contract bind the person or estate of his ward."[7] But the rule is, after all, a technical one; for the insertion of words showing representative capacity imports that the contract was made as a trustee. And on all such contracts, fairly made, the guardian is entitled to reimbursement from his ward's estate. It is simply meant that the person with whom the guardian contracts on behalf of his ward may presume a sufficiency of assets. If one acting in a trust capacity could claim exemption from all personal liability, on the ground that there was none of the ward's property left in his hands for payment, he might abuse his privileges. His knowledge of the exact state of the trust fund and his power of management would give him an immense advantage over the other contracting party. Hence the propriety of the rule that guardians are personally bound on their contracts, in dealing with others on

[1] Torry *v.* Black, 58 N. Y. 158.

[2] Blue *v.* Marshall, 3 P. Wms. 381.

[3] The tutor of an infant cannot confess judgment or revive a debt which is prescribed. Clement *v.* Sigur, 29 La. Ann. 798; Metcalfe *v.* Alter, 31 La. Ann. 389.

[4] Jones *v.* Brewer, 1 Pick. 317; Tenney *v.* Evans, 14 N. H. 343.

[5] Oliver *v.* Houdlet, 13 Mass. 237. And see Bac. Abr. Guardian (G).

[6] Hite *v.* Hite, 2 Rand. 409.

[7] Forster *v.* Fuller, 6 Mass. 58.

the ward's behalf, while in turn they get a recompense from the estate by charging their expenses to the ward's account, to be passed upon by the court. The insertion of words implying a trust becomes therefore essential in determining whether a contract was intentionally made by the guardian on his own personal account. If the guardian contracts a debt for his ward's benefit, he becomes, in this sense, personally liable; and this, even though the debt be for necessaries.[1] Where, however, the guardian's contract with the creditor shows an express limitation of his liability, by mutual assent, to the assets of the ward in the guardian's hands, it would appear that the guardian incurs no personal liability beyond such assets,[2] though he cannot thereby bind the ward's person or estate absolutely.[3]

§ 345. **Title to Promissory Notes, &c.; Promise not Collateral.** — The title to promissory notes made payable to the guardian is *prima facie* in him. And this is true though his authority has ceased. Hence he may maintain suit, unless the defendant can show that it has been transferred to the successor, or otherwise disprove title.[4] The guardian may, however, indorse over such note on the cessation of his authority; in which case the person in lawful possession should sue. So, too, the guardian may, after his ward's death, transfer a note for the ward's money, payable to the ward or bearer, to a third person for collection.[5]

The promise of a guardian to pay his ward's debts is not collateral, within the statute of frauds; and therefore it need not be expressed in writing.[6] And where a guardian, on surrendering his trust, transfers to his successor a debt due the ward, this is sufficient consideration to support the promise of the latter to pay the former guardian's debt.[7]

§ 346. **Guardian's Employment of Agents.** — Under suitable circumstances a guardian may employ other agents than

[1] Simms *v.* Norris, 5 Ala. 42; Rollins *v.* Marsh, 128 Mass. 116. And see *supra*, §§ 337, 338, as to the ward's necessaries Sperry *v.* Fanning, 80 Ill. 371.

[2] Sperry *v.* Fanning, 80 Ill. 371.

[3] Rollins *v.* Marsh, 128 Mass. 116.

[4] Chambles *v.* Vick, 34 Miss. 109; Fountain *v.* Anderson, 33 Ga. 372; King *v.* Seals, 45 Ala. 415.

[5] Fletcher *v.* Fletcher, 29 Vt. 98.

[6] Roche *v.* Chaplin, 1 Bailey, 419.

[7] French *v.* Thompson, 6 Vt. 54; cf. 47 Ala. 329.

attorneys at law, and charge their compensation in his accounts.[1]

§ 347. **Changes in Character of Ward's Property; Sales, Exchanges, &c.** — Conversions, that is to say, changes made in the character of trust property, from personal into real, or real into personal estate, are never favored, especially where the natural consequence would be to vary rights of inheritance. The previous sanction of chancery should always be sought; and this is only given under strong circumstances of propriety. The same may be said of exchanges of the ward's property. Courts are reluctant to disturb the property of those who are only temporarily disabled from assuming full control. Sales of real estate are in general only partial, and for necessary purposes. But sales and exchanges of personal estate are very common. And the guardian may sell personal estate for the purposes of the trust without a previous order of court, provided he acts fairly and with good judgment; though his safer course is to obtain permission. But sales of the real estate of the ward would be extremely perilous, if not absolutely void, unless previous authority had been obtained. Undoubtedly, they could not bind the ward under such circumstances. Nor is the guardian permitted to sell first and obtain judicial sanction afterwards. Nor to contract to sell at his own instance.[2] So the guardian must not buy land with the infant's money without the direction of chancery. And having obtained permission to do so, he is bound to exercise good faith and seek his ward's best interests.[3]

But a practical conversion takes place where the guardian uses the trust money in paying off the ward's mortgage debts. He is bound to apply rents and profits in keeping down the interest on such encumbrances; nor can he, in general, invest

[1] *Re* Flinn, 31 N. J. Eq. 640; *supra*, § 343.

[2] Thacker *v.* Henderson, 69 Barb. 271; next c.

[3] Macphers. Inf. 278 *et seq.*; 2 Kent Com. 228-230, and notes; Story Eq. Juris. § 1357; 3 P. Wms. 101; *Ex parte* Phillips, 19 Ves. 122; Skelton *v.* Ordinary, 32 Ga. 266; Ware *v.* Polhill, 11 Ves. 278; Holbrook *v.* Brooks, 33 Conn. 347; Royer's Appeal, 11 Penn. St. 36; Woods *v.* Boots, 60 Mo. 546; *Ex parte* Crutchfield, 3 Yerg. 336; Dorr, Petitioner, Walker Eq. 145; Kendall *v.* Miller, 9 Cal. 591. See Harris *v.* Harris, 6 Gill & Johns. 111; Davis's Appeal, 60 Penn. St. 118.

personal estate more judiciously than in freeing the land from debt altogether.[1] An order of court is not necessary in such cases, nor for judgment debts, but it would be required for discharging other than direct encumbrances.[2] So, too, a guardian may redeem his ward's estate from foreclosure.[3] The statutes of most American States have greatly altered the law on the subject of conversions, so as not only to facilitate the sale of real estate belonging to *cestuis que trust*, but to enable their fiduciaries, under judicial authority, to make specific performance of contracts and to release vested and contingent interests.[4]

Where, at the time the court orders the sale or purchase of real estate by the guardian, the conversion was beneficial to the ward, it would appear that the guardian is not made liable if such conversion afterwards turns out injurious.[5] But whether an order of court would protect conduct notoriously imprudent, as if there should be a sudden and marked decline in the value of the land from some cause not within the consideration of the court at the time of issuing the order, and such as would have been sufficient for its revocation, and the guardian, nevertheless, goes on and makes the sale at a sacrifice, may well be doubted.[6]

Where a guardian purchases, on behalf of his ward, a house and lot expressly subject to a mortgage he becomes personally liable for the amount of the unpaid debt; even though he had been authorized by the court to make the purchase. But the court will afford him relief from the ward's estate.[7] In an English case, where a guardian borrowed money to pay off encumbrances on the ward's estate and

[1] Macphers. Inf. 285; March *v.* Bennett, 1 Vern. 428; Jennings *v.* Looks, 2 P. Wms. 278.

[2] Palmes *v.* Danby, Prec. in Ch. 137; s. c. 1 Eq. Ab. 261; Waters *v.* Ebral, 2 Vern. 606.

[3] Botham *v.* M'Intier, 19 Pick. 346; Marvin *v.* Schilling, 12 Mich. 356. But see Sheahan *v.* Wayne, 42 Mich. 69.

[4] See next chapter. It may be incumbent upon a guardian by virtue of his trust to sell land or foreclose, under a mortgage which he holds as an investment for his ward, in which case the usual rules of trusteeship apply. Taylor *v.* Hite, 61 Mo. 142.

[5] Bonsall's Case, 1 Rawle, 266.

[6] See Harding *v.* Larned, 4 Allen, 426.

[7] Woodward's Appeal, 38 Penn. St. 322; Low *v.* Purdy, 2 Lans. 422.

promised to give the lender security, but died before doing so, the court refused to decree specific performance; though the lender's money had been duly applied for that purpose.[1] Here, however, there had been no written contract.[2]

§ 348. **Limit of Guardian's Responsibility in Management.** — It is a general principle that acts done by a guardian without authority will be protected and will bind the infant, if they turn out eventually beneficial to the latter; but the guardian does such acts at his own peril. The transaction will perhaps avail as between the guardian and third parties; but the infant, on arriving at majority, may usually disaffirm it altogether, and require the guardian to place him *in statu quo*.[3] This risk is restricted to unauthorized acts; for no guardian can be an infallible judge of what is beneficial to his ward; and to make him liable in ordinary cases, beyond the limits of good faith and a sound discretion, would be intolerable. Hence, as judicial control becomes relaxed, the guardian's unauthorized acts may fairly be considered as lessening in number and importance, save so far as local statutes prescribe the rule, as they frequently do. Where the guardian acts under judicial sanction, what he does in good faith receives strong protection.[4]

It is to be observed, however, that chancery not only punishes corruption, but treats with suspicion all acts and circumstances evincing a disposition on the guardian's part to derive undue advantage from his position. This rule is applicable to trustees in general. The trust should be managed exclusively in the interest of the *cestui que trust;* or, in case of guardianship, for the ward's benefit. The guardian cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract or purchase or sale as to the subject of the trust. If he purchases in his character as guardian, he presumptively uses his ward's funds for that purpose. If he settles a debt upon beneficial terms,

[1] Hooper *v.* Eyles, 2 Vern. 480.

[2] As to applying money in payment for land, where the title vested prior to the guardianship, see McCall *v.* Flippin, 58 Tenn. 161.

[3] Macphers. Inf. 339; *infra*, §

[4] See McElheny *v.* Musick, 63 Ill. 329.

or purchases it at a discount, the advantage is to accrue entirely to the ward's estate.[1] He cannot be permitted to place himself in an attitude of hostility to his ward, or derive any benefit from the latter's loss.[2] Wherever he abuses the confidence reposed in him, he will be held to a strict accountability.[3] Where the guardian purchases for himself at sales of his ward's property, his conduct will be closely scrutinized. But where no fraud appears, and the sale appears beneficial to the ward, the more reasonable doctrine is that the transaction is sustainable in equity, subject to the ward's subsequent election, on reaching majority, to disaffirm the sale. The guardian, meanwhile, takes the legal title ; more especially if the sale was conducted through a third party, who afterwards conveyed to him.[4]

The guardian is not to apply property exempt from attachment or execution in satisfaction of his ward's debts.[5] He must not mingle his own funds with those of his ward. Where there are several wards, he must allot to each his due share of expenses and profits. And if he becomes insolvent, and gives the bulk of the property received by him to one, and little or nothing to the others, equity will still treat the property as belonging to the wards in their proper shares.[6]

So far as the guardian acts within the scope of his powers he is bound only to the observance of fidelity, and such dili-

[1] White *v.* Parker, 8 Barb. 48; 2 Kent Com. 229; Diettrich *v.* Heft, 5 Barr, 87; Clowes *v.* Van Antwerp, 4 Barb. 416; Lefevre *v.* Laraway, 22 Barb. 168; Kennaird *v.* Adams, 11 B. Monr. 102; Sparhawk *v.* Allen, 1 Foster (N. H), 9; Heard *v.* Daniel, 26 Miss. 451; Jennings *v.* Kee, 5 Ind. 257; *infra*, c. 9.

[2] Mann *v.* McDonald, 10 Humph. 275.

[3] As a guardian must not reap undue benefit, he cannot make a collusive sale or improve the property for his own benefit. Lane *v.* Taylor, 40 Ind. 495. He must not derive profit by setting fictitious values, but account according to true valuations. Titles adverse to the ward's interest cannot be disposed of for his own benefit and to the ward's detriment. Spelman *v.* Terry, 15 N. Y. Supr. 205. If the guardian has a life interest in land of which the ward is seised in fee, he cannot apply the whole cost of removing an encumbrance to the ward, principal and interest. Bourne *v.* Maybin, 3 Woods C. C. 724.

[4] *Ex parte* Lacey, 6 Ves. 625; Lefevre *v.* Laraway, 22 Barb. 168; Chorpenning's Appeal, 32 Penn. St. 315; Hoskins *v.* Wilson, 4 Dev. & Batt. 243; Blackmore *v.* Shelby, 8 Humph. 439; Hudson *v.* Helmes, 23 Ala. 585. But see Beal *v.* Harmon, 38 Mo. 435. See *infra*, ch. 9. In Missouri, under the Spanish laws, the guardian might purchase lands of his ward by the court's permission. M'Nair *v.* Hunt, 5 Mo. 300.

[5] Fuller *v.* Wing, 5 Shep. 222.

[6] Case of Hampton, 17 S. & R. 144.

gence and prudence as men display in the ordinary affairs of life. And in absence of misconduct his acts are liberally regarded. He is not liable for investments carefully made, which afterwards prove worthless. Nor is he responsible for funds of which he was robbed without his fault.[1] But for any fraudulent transaction to which he lends himself he must suffer the consequences.[2] And if by his negligence the estate has suffered loss, he must make good the deficiency.[3] What acts amount to fraud or culpable negligence will depend upon circumstances. Ignorance of duty is equivalent to misconduct, where the ward's interests suffer by it.[4] And a sale of the ward's rights of property at a grossly inadequate price, upon the guardian's own responsibility, may be afterwards set aside at the instance of the ward.[5] Unauthorized acts which turn out ill for the ward are not protected.[6]

§ 349. **The Same Subject.** — The guardian of an insane adult ward cannot lawfully continue the ward's business, so as to charge it with losses thereby incurred.[7] But where he does so beneficially, the ward, by acceptance of the benefits after becoming *sui juris*, may be estopped from objecting.[8]

The guardian's responsibility extends only to such property of his ward as is accessible to him. But having once come into possession, or gained knowledge of his right of possession, it is his duty to account for the property; for the law then imposes upon him a *prima facie* liability.[9] And the fact that money was collected in another State beyond his jurisdiction cannot affect his obligation to account.

Courts of equity follow the ward's property whenever wrongfully disposed of or appropriated by the guardian; and any person in whose hands it is found will be held as trustee, if it can be shown that it came into his possession

[1] Furman *v.* Coe, 1 Caines' Cas. 96; Atkinson *v.* Whitehead, 66 N. C. 296.

[2] McCahan's Appeal, 7 Barr, 56.

[3] 2 Kent Com. 230; Glover *v.* Glover, 1 McMull. 153; Royer's Appeal, 11 Penn. St. 36; Wynn *v.* Benbury, 4 Jones Eq. 395.

[4] Nicholson's Appeal, 20 Penn. St. 50.

[5] Leonard *v.* Barnum, 34 Wis. 105.

[6] May *v.* Duke, 61 Ala. 53; McDuffie *v.* McIntyre, 11 S. C. 551.

[7] Corcoran *v.* Allen, 11 R. I. 567.

[8] Hoyt *v.* Sprague, 103 U. S. Supr. 613.

[9] Bethune *v.* Green, 27 Ga. 56; Howell *v.* Williamson, 14 Ala. 419; Martin *v.* Stevens, 30 Miss. 159.

with notice of the trust.[1] The guardian himself may follow his ward's property wherever he can find it, whether into the hands of a former guardian or such guardian's transferee.[2] And legacies charged on land and payable to the ward on reaching majority, though paid meanwhile to his guardian, remain a lien on the land until actually received by the ward.[3] Innocent third parties are not affected by the guardian's fraud; though the usual barrier applies as to negotiable securities.[4] But in general, where third parties neglect to make reasonable inquiries as to facts which ought to have raised suspicion in their minds, they may have to suffer for their imprudence.[5]

§ 350. **Management of Ward's Real Estate in Detail.** — The guardian has the management and control of his ward's real estate so long as his general authority lasts. It is his duty to collect the rents for the benefit of his ward, in which connection he may, according to custom, employ a real estate agent.[6] He may avow for *damage feasant*, sue for non-payment of rent, and bring trespass and ejectment in his own name. This was the common-law rule as to guardians in socage, and it still applies to testamentary, chancery, and perhaps to probate guardians. The recognized principle is that such guardians have an authority coupled with an interest, and not a bare authority.[7] A guardian makes himself personally liable where he permits others to negligently collect the rents, or occupies the premises himself, or suffers them to remain unoccupied, or wilfully or carelessly permits others to occupy them to the ward's detriment.[8]

[1] Carpenter *v.* McBride, 3 Fla. 292. See McCall *v.* Flippin, 58 Tenn. 161.

[2] Fox *v.* Kerper, 51 Ind. 148.

[3] Cato *v.* Gentry, 28 Ga. 327.

[4] See Gum *v.* Swearingen, 69 Mo. 553; 2 School. Pers. Prop. 23.

[5] Gale *v.* Wells, 12 Barb. 84; Hunter *v.* Lawrence, 11 Gratt. 111; Bevis *v.* Heflin, 63 Ind. 129.

[6] *Re* Flinn, 31 N. J. Eq. 640.

[7] Shaw *v.* Shaw, Vern. & Scriv. 607; Bacon *v.* Taylor, Kirby, 368; 2 Kent Com. 228; Torry *v.* Black, 58 N. Y. 185; Pond *v.* Curtiss, 7 Wend. 45; Huff *v.* Walker, 1 Cart. 193. And see O'Hara *v.* Shepherd, 3 Md. Ch. 306. But such suits cannot in Illinois be brought by a probate or statute guardian, and under local statutes different rules apply. Muller *v.* Benner, 69 Ill. 108; Wallis *v.* Bardwell, 126 Mass. 366.

[8] Wills' Appeal, 22 Penn. St. 325; Clark *v.* Burnside, 15 Ill. 62; Hughes' Appeal, 53 Penn. St. 500; Spelman *v.* Terry, 74 N. Y. 448.

The guardian may also lease his ward's lands. But his demise cannot last for a longer period than the law allows for the continuance of his trust. And it will determine upon the ward's death in any event. A lease made by a guardian, extending beyond the minority of his ward, was once considered void; but the modern rule treats such leases as void only for the excess at the election of the ward.[1] The same principles apply to guardians of insane persons and spendthrifts. And the rule embraces assignments of the ward's leases.[2] The guardian must not lease imprudently or so as to sacrifice his ward's interests for the benefit of others.[3] The father, as natural guardian, cannot lease the land of his child; nor can the mother; nor can any mere custodian of the person.[4] So, too, guardians may take premises on lease. And though the words "A. and B., guardians" of certain minors, are used in a lease, the guardians are personally bound to the lessor to pay the rent.[5] The guardian's power to lease extends only to usufruct, and not to exhaustion of the *corpus*.[6]

Where a guardian cultivates his ward's farm instead of letting it out, he is bound to cultivate as a prudent farmer would his own land; otherwise the loss by depreciation of the property in value must be made good by him.[7] And for losses occurring through his bad management of his ward's real estate, he cannot expect to be recompensed.[8]

The guardian may grant an easement in his ward's lands; but it is of no avail beyond the limit of his guardianship.[9] He may authorize the cutting of standing timber, and allow

[1] Bac. Abr. Leases I.; 2 Kent Com. 228; 1 Washb. Real Prop. 307; Rex *v.* Oakley, 10 East, 494; Putnam *v.* Ritchie, 6 Paige, 390; Field *v.* Schieffelin, 7 Johns. Ch. 150; People *v.* Ingersoll, 20 Hun, 316; Richardson *v.* Richardson, 49 Mo. 29. See statute restriction in Muller *v.* Benner, 69 Ill. 108.

[2] Ross *v.* Gill, 4 Call, 250.

[3] Knothe *v.* Kalser, 5 Thomp. & C. 4; Thackray's Appeal, 75 Penn. St. 132.

[4] Anderson *v.* Darby, 1 N. & McC. 369; Magruder *v.* Peter, 4 Gill & Johns. 323; Ross *v.* Cobb, 9 Yerg. 463. See Drury *v.* Conner, 1 Har. & G. 220.

[5] Hannen *v.* Ewalt, 18 Penn. St. 9. See Snook *v.* Sutton, 5 Halst. 133.

[6] Thus, a guardian cannot lease oil or mineral lands for the purpose of working out the product. Stoughton's Appeal, 88 Penn. St. 198.

[7] Willis *v.* Fox, 25 Wis. 646.

[8] Harding *v.* Larned, 4 Allen, 426.

[9] Watkins *v.* Peck, 13 N. H. 360; Johnson *v.* Carter, 16 Mass. 443.

others to carry it away,[1] though not so as to authorize a waste of the *corpus*.[2] But his license should be given in all cases for his ward's benefit, and so with the receipt of damages for another's trespass.[3] And if trees are cut and carried away by his permission, so that trespass cannot be maintained, he must make compensation to the ward.[4]

Guardians may assign dower. And it seems that the guardian's assignment will bind the heir, although Blackstone and Fitzherbert state the law otherwise.[5] The deed of a married woman, guardian of infants, in such capacity, does not convey her right of dower.[6] Guardians may also institute proceedings for partition. Such proceedings, in England, should be by bill in equity.[7] In this country, the subject is commonly regulated by statute. A guardian may purchase for his ward, who is one of the heirs, such portion of an estate as the other heirs refused to take on partition, and the court ordered to be sold.[8]

§ 351. **The Same Subject.** — From what has been already said, it appears clear that the guardian may execute all the deeds and other writings necessary to the fulfilment of his trust. But such instruments should be signed in the name of his ward.[9] On the same principle that agents and trustees are personally bound when they exceed their authority, a guardian makes himself personally liable for stipulations which he has no right to insert in a deed, and for authorized covenants, so badly worded that they fail to bind the ward's estate; but not, it would appear, for implied covenants merely.[10] Where a married woman has executed a deed as guardian, it would seem, on principle, that the joinder of her husband is unnecessary.[11]

[1] Fonbl. Eq. Tr. 82, *n.*; Thompson *v.* Boardman, 1 Vt. 367; Bond *v.* Lockwood, 33 Ill. 212.

[2] Torry *v.* Black, 58 N. Y. 185.

[3] *Ib.*

[4] Truss *v.* Old, 6 Rand. 556.

[5] 2 Bl. Com. 136; Fitzh. N. B. 348; 1 Washb. Real Prop. 226; Jones *v.* Brewer, 1 Pick. 314; Young *v.* Tarbell, 37 Me. 509; Curtis *v.* Hobart, 41 Me. 230; Boyers *v.* Newbanks, 2 Ind. 388; Clark *v.* Burnside, 15 Ill. 62.

[6] Jones *v.* Hollopeter, 10 S. & R. 326.

[7] Macphers. Inf. 340.

[8] Bowman's Appeal, 3 Watts, 369.

[9] Hunter *v.* Dashwood, 2 Edw. Ch. 415.

[10] Whiting *v.* Dewey, 15 Pick. 428; Webster *v.* Conley, 46 Ill. 13.

[11] Palmer *v.* Oakley, 2 Doug. 433.

It is the guardian's duty to keep the ward's premises in repair, and he may use cash in his hands for that purpose within reasonable limits.[1] But he cannot build or make expensive permanent improvements without a previous order from a court of equity, which is to be construed strictly.[2] And where he advances money for such purposes, without first obtaining an order, it would appear that he is without a remedy.[3] But the court will sometimes protect such expenditures, on the ground that the ward has received a benefit thereby.[4] And this seems the more reasonable doctrine, though not clearly recognized in this country. Authority granted to expend a certain sum for this purpose is no authority to exceed that sum, though it should prove inadequate.[5] Nor has the builder any lien upon the ward's real estate for such excess.[6] A guardian's stipulation, in his lease of the ward's lands, to pay for improvements, will not bind the ward.[7]

Stock and farming utensils on the ward's farm are *prima facie* the ward's property, as against a guardian who has carried on the farm in person.[8] But this does not exempt from attachment property of the guardian which he purchases and places upon the ward's lands; for the question of title is always open to proof.[9]

The guardian's power to borrow money on a mortgage of his ward's lands, and to create liens upon it generally, is regarded with very little favor. He could hardly make the mortgage operate beyond the minority of his ward, at any rate, if the ward, on reaching majority, elected to disaffirm it; and his only safe course would be to secure the previous

An infant's guardian may accept delivery of a deed of conveyance to his ward. Barney *v.* Seeley, 38 Wis. 381.

[1] See Robinson *v.* Hersey, 60 Me. 225.

[2] Payne *v.* Stone, 7 S. & M. 367; Miller's Estate, 1 Penn. St. 326. And see Powell *v.* North, 3 Ind. 392; Lane *v.* Taylor, 40 Ind. 495.

[3] Hassard *v.* Rowe, 11 Barb. 22; Bellinger *v.* Shafer, 2 Sandf. Ch. 293.

[4] See Macphers. Inf. 295; 1 Atk. 489; Hood *v.* Bridport, 11 E. L. & Eq. 271; Jackson *v.* Jackson, 1 Gratt. 143.

[5] Snodgrass's Appeal, 37 Penn. St. 377.

[6] Guy *v.* Du Uprey, 16 Cal. 195.

[7] Barrett *v.* Cocke, 12 Heisk. 566.

[8] Tenney *v.* Evans, 11 N. H. 346.

[9] *Ib.*, 14 N. H. 343.

permission of the court; which American statutes generally permit to be done on special proceedings.[1]

§ 352. **Management of the Ward's Personal Property in Detail.** — As to personal property, one of the first duties of all trustees is to place the property in a state of security. Guardians in this respect are treated on the same footing as other trustees. *Choses in action* should be reduced to possession without unnecessary delay;[2] to which we should add, however, that incorporeal personalty of various kinds serves in modern times for a long-continued investment. All claims should be collected; as prudence may require, concerning which the guardian has been put upon inquiry.[3] Money temporarily in the guardian's hands should be deposited in some responsible bank. But wherever placed and however invested, the trust funds should be separated, by distinguishing marks, from his private property; exceptions occurring, however, in some cases of a temporary deposit, as for instance where the money is left in one's iron safe with his private valuable papers for no unreasonable length of time and under circumstances imputing to him no want of ordinary prudence and diligence, either in placing and keeping it there in that condition, or in pursuing the thief who took it out. Otherwise, he would be personally liable for loss. Hence, if a guardian deposits money in the bank to his own account, and the bank afterwards fails, he must suffer the consequences;[4] though it is otherwise, where he deposits there not imprudently or dis-

[1] Merritt *v.* Simpson, 41 Ill. 391; Lovelace *v.* Smith, 39 Ga. 130; Wood *v.* Truax, 39 Mich. 628; Edwards *v.* Taliafero, 34 Mich. 13. Power to sell and convey under a trust does not include power to mortgage. Tyson *v.* Latrobe, 42 Md. 325. As to assigning a mortgage, see next section. Where a statute requires (as in case of a land warrant) a particular authority to be obtained for a transfer of land, one who purchases without ascertaining that it has been pursued acts at his peril. Mack *v.* Brammer, 28 Ohio St. 508.

[2] See Hill Trustees, 447, and cases cited; Caffrey *v.* Darby, 6 Ves. 488; Powell *v.* Evans, 5 Ves. 839; Lewson *v.* Copeland, 2 Bro. C. C. 156; Tebbs *v.* Carpenter, 1 Madd. 298; Caney *v.* Bond, 6 Beav. 486. So as to infant husband or wife. Ware *v.* Ware, 28 Gratt. 670; Shanks *v.* Edmondson, 28 Gratt. 804.

[3] The guardian of a soldier's heir should ascertain as to his pension and bounty rights, and pursue claims accordingly. Clodfelter *v.* Bost, 70 N. C. 733.

[4] Wren *v.* Kirton, 11 Ves. 377; Fletcher *v.* Walker, 3 Madd. 73; McDonnell *v.* Harding, 7 Sim. 178; Routh *v.* Howell, 3 Ves. 565; Matthews *v.* Brise, 6 Beav. 239; Atkinson *v.* Whitehead, 66 N. C. 296.

honestly in his trust capacity.[1] So if he purchases stock or takes a promissory note in his own name it will be treated as his own; but not, necessarily, to the ward's prejudice, for it might otherwise be clearly identified and traced as the ward's property.[2] And it would appear that he is not permitted in such cases to show by other evidence an intent to charge his ward; for the act itself is conclusive against him.[3]

The guardian may receive money secured to the ward by mortgage, and discharge the mortgage, before, at, or after maturity, in the exercise of due prudence and foresight;[4] and, so, too, he may extend or renew a mortgage note or other note on fair terms;[5] and on a breach may sell.[6] It would appear, too, that, in the absence of any statute limiting his powers, he has, as incidental to his office and duties, the power to sell in the exercise of sound business discretion, his ward's personal property, except, perhaps, as to peculiar incorporeal kinds.[7]

In collecting outstanding debts or prosecuting claims a reasonable time is to be allowed the guardian. Ordinary prudence and diligence is the rule; and for culpable negligence subjecting the estate of his ward to loss he may make himself personally liable, even though the demand be against a person residing in another State.[8] He is not to sue in all cases

[1] Post's Estate, Myrick's Prob. 230.

[2] Jenkins *v.* Walter, 8 Gill & Johns. 218; White *v.* Parker, 8 Barb. 48; Knowlton *v.* Bradley, 17 N. H. 458; Brown *v.* Dunham, 11 Gray, 42; Beasley *v.* Watson, 41 Ala. 234.

[3] Brisbane *v.* Bank, 4 Watts, 92; Stanley's Appeal, 8 Barr, 431.

[4] Chapman *v.* Tibbits, 33 N. Y. 289; Smith *v.* Dibrell, 31 Tex. 239.

[5] Willick *v.* Taggart, 17 Hun, 511.

[6] Taylor *v.* Hite, 61 Mo. 142.

[7] See Wallace *v.* Holmes, 9 Blatchf. 67; *supra*, Humphrey *v.* Buisson, 19 Minn. 221. A guardian cannot, in South Carolina, sell and assign his ward's bond and mortgage of real estate without judicial sanction. McDuffie *v.* McIntyre, 11 S. C. 551. *Aliter*, probably, in many States; though the right to assign real-estate security is more doubtful than that of assigning a simple note or bond upon personal security or without security. See preceding section; Mack *v.* Brammer, 28 Ohio St. 508. General guardians do not represent their infant wards in foreclosure proceedings. Sheahan *v.* Wayne, 42 Mich. 69.

Stock and its transfer follow peculiar rules. Shares of stock standing in the name of "A. B. guardian" cannot be sold so as to compel the company to recognize the transferee, without order of the court. De la Montagnie *v.* Union Ins. Co., 42 Cal. 290.

A guardian's sale of cotton on credit, taking the purchaser's note without security according to business usage, does not necessarily render the guardian liable if such purchaser turn out insolvent. State *v.* Morrison, 68 N. C. 162.

[8] Potter *v.* Hiscox, 30 Conn. 508.

where ordinary modes of collection fail; for the expenses of litigation are to be weighed against the chances of realizing a benefit. What is a reasonable time will depend upon circumstances. It is his duty to contest all improper claims, though presented by the surviving parent.[1] Nor can he with safety permit the administrator of the estate of his ward's father to control property of which he is the legal custodian. And he must hold an administrator to account in all cases.[2] If a guardian takes notes of third persons in payment of an indebtedness to his ward, and afterwards receives the money upon the notes and appropriates the money as guardian, the payment is sufficient.[3] In the exercise of prudence and good faith a guardian may, to save the ward from loss, accept property, real or personal, in settlement of the latter's debt or claim.[4] Nor is he personally liable, in every case, on a note received by him with other assets, which turns out afterwards to be worthless, on the ground that it might have been collected when transferred to him; for a guardian's liability has its reasonable limits; the question is one of ordinary prudence and good faith.[5] And money paid to a guardian by mistake cannot be recovered again, if he has paid it out before receiving notice of the mistake.[6]

§ 353. **Investment of Ward's Funds.** — Like all other trustees, the guardian is bound to make his ward's funds productive. He should see that the capital which comes to his hands is well secured; procure a change of securities whenever necessary; and invest surplus moneys where they may draw interest. For funds accruing during the continuance of his trust he is allowed a reasonable time for making his investment, usually limited to six months, though in some cases a year is allowed, and in others only three months; and he cannot suffer the ward's money to remain longer idle.[7] But he may keep a

[1] *Ex parte* Guernsey, 21 Ill. 443.

[2] Wills's Appeal, 22 Penn. St. 325; Clark *v.* Tompkins, 1 S. C. N. S. 119.

[3] Jones *v.* Jones, 20 Iowa, 388.

[4] Mason *v.* Buchanan, 62 Ala. 110.

[5] Stem's Appeal, 5 Whart. 472; Waring *v.* Darnall, 10 Gill & Johns. 127; Love *v.* Logan, 69 N. C. 70.

[6] Massey *v.* Massey, 2 Hill Ch. 492.

[7] Worrell's Appeal, 23 Penn. St. 44; White *v.* Parker, 8 Barb. 48; Karr *v.* Karr, 6 Dana, 3; Pettus *v.* Sutton, 10 Rich. Eq. 356; Owen *v.* Peebles, 42 Ala. 338; *infra*, § 354.

suitable surplus on hand for current and contingent expenses; also sums too small to be wisely invested.[1] And family relics and ornaments, household furniture and farm stock, are generally exempted from the rule of investment.

The investment of the trust funds is therefore one of the most important duties of a guardian, both as respects the interests of his ward and his own security. Testamentary guardians, like trustees under deeds of trust, should follow the direction of the testator in making investments; and for losses arising from such course they are not responsible. But their powers are to be construed strictly; and where the will is silent or the directions are in general terms, or manifestly improper, chancery rules of investment must prevail.[2]

In England, the estates of infants and persons of unsound mind under chancery guardianship are usually controlled by the court. The general practice is to get in all the money due the ward and invest it in the public funds. For this purpose a receiver is appointed, if necessary. The court will not allow the ward's money to be left out on personal security, without reference to a master as to the sufficiency of the security; nor upon judgment security; but, where advantageously invested on the security of real estate, in Great Britain, the court will not disturb the investment. The statute of 4 and 5 Will. IV. c. 29, authorizes investments on real security in Ireland, under the direction of the English Court of Chancery.[3]

In this country, the management of the personal estate of infants and others is usually left to their guardian, subject to recognized principles of law which he is bound to follow. There are statutes in many States which authorize the investment by fiduciaries only in particular kinds of securities. In others, it is provided that investments may be made in any manner for the interest of all concerned.[4] It is the general

[1] Baker *v.* Richards, 8 S. & R. 12; Knowlton *v.* Bradley, 17 N. H. 458.

[2] Macphers. Inf. 266. And see Hill Trustees, 368–384, and Wharton's notes.

[3] Macphers. Inf. 266; Hill Trustees, 395; Norbury *v.* Norbury, 4 Madd. 191.

[4] Gary *v.* Cannon, 3 Ired. Eq. 64. See State *v.* Harrison, 75 N. C. 432.

rule that either public securities or real securities are to be preferred.[1] Investments in stock of the United States, or of the State having jurisdiction of the ward, are doubtless proper; so, mortgage investments on first-class property within the State, and city and town securities, are frequently designated as suitable investments. But the stock of railway, navigation, and other incorporated companies, whose stability is uncertain, are unsuitable.[2] For small sums of money savings banks of good repute may be found convenient. United States Bank stock has been considered a proper investment.[3] And while, in some States, fiduciary officers are strictly limited in their power of investments; in others, as Massachusetts, there is no favored stock or security, and they are only bound to exercise reasonable prudence and sound faith.[4] But for losses which are without the protection of this rule, the guardian or other trustee is always personally responsible. And loans on the credit of a single individual (even though it be the child's parent[5]) or a single firm, without other security, or with very doubtful security, are not sustained.[6] Nor investments in indorsed notes of parties of bad or doubtful standing;[7] though the rule would be otherwise if their credit is good. Loans to individuals with good collateral security are upheld,

[1] Gray *v.* Fox, Saxt. 259; Worrell's Appeal, 9 Barr, 508; Nance *v.* Nance, 1 S. C. N. S. 209.

[2] Worrell's Appeal, 23 Penn. St. 44; Allen *v.* Gaillard, 1 S. C. N. S. 279; French *v.* Currier, 47 N. H. 88. There are a number of recent decisions in Virginia, North Carolina, South Carolina, Alabama, and other Southern States, of temporary importance, which relate to investments in what are known as "Confederate securities" and settlements by a guardian in the so-called "Confederate money." Among these see Powell *v.* Boon, 43 Ala. 459; White *v.* Nesbit, 21 La. Ann. 600; Brand *v.* Abbott, 42 Ala. 499; Sudderth *v.* McCombs, 65 N. C. 186; Coffin *v.* Bramlitt, 42 Miss. 194.

[3] Boggs *v.* Adger, 4 Rich. Eq. 408; *contra*, Smith *v.* Smith, 7 J. J. Marsh. 238. And see Watson *v.* Stone, 40 Ala. 451.

[4] Konigmacher's Appeal, 1 Penn. 207; Kimball *v.* Perkins, 130 Mass. 141; Lovell *v.* Minot, 20 Pick. 116; Nance *v.* Nance, 1 S. C. N. S. 209; Swartwout *v.* Oaks, 52 Barb. 622.

[5] Wyckoff *v.* Hulse, 32 N. J. Eq. 697.

[6] Smith *v.* Smith, 4 Johns. Ch. 281; Clay *v.* Clay, 3 Met. (Ky.) 548; Boyett *v.* Hurst, 1 Jones Eq. 166; Clark *v.* Garfield, 8 Allen, 427; Gilbert *v.* Guptil, 34 Ill. 112; Lee *v.* Lee, 55 Ala. 590. But see State *v.* Morrison, 68 N. C. 162.

[7] Harding *v.* Larned, 4 Allen, 426; Fletcher *v.* Fletcher, 29 Vt. 98; Covington *v.* Leak, 65 N. C. 594; Hurdle *v.* Leath, 63 N. C. 597.

in the absence of a restrictive statute.[1] Speculative investments may be made by prudent men in their own business, but not by fiduciaries with their trust funds. If a loan by the guardian be sanctioned by the court he is not liable for loss, unless it arises from his subsequent default.[2] But the assent of the court must be in writing and of record; not given by parol.[3]

§ 354. **Same Subject; when Chargeable with Interest.** — Negligence and unreasonable delay in the investment of trust funds is a breach of official duty for which the trustee is held answerable. And where the guardian carelessly suffers cash balances to remain idle in his hands, or mingles the ward's money with his own, he is chargeable with interest, and in case of misconduct with compound interest.[4] But he must be allowed a reasonable time under all the circumstances of the case.[5] It remains a disputed question whether the guardian should be charged with compound interest for mere delinquency; but it seems that he should not. In some cases a trustee has been so charged, because the trusts under which he acted required him to place the fund where more than simple interest would have accumulated. In others, the principle seems to have been to exact it as a penalty for his misconduct in deriving, or seeking to derive, some pecuniary advantage from the trust money, or in squandering it. In all cases courts of chancery have exercised a liberal discretion, according to the circumstances.[6] The rule announced by Chancellor Kent cannot, therefore, be considered quite accurate.[7]

[1] Lovell *v.* Minot, 20 Pick. 116. See Torry *v.* Frazer, 2 Redf. 486.

[2] O'Hara *v.* Shepherd, 3 Md. Ch. 306; Bryant *v.* Craig, 12 Ala. 354; Carlysle *v.* Carlysle, 10 Md. 440.

[3] See Newman *v.* Reed, 50 Ala. 297.

[4] Barney *v.* Saunders, 16 How. 535; Swindall *v.* Swindall, 8 Ired. Eq. 285; Knott *v.* Cottee, 13 E. L. & Eq. 304; Stark *v.* Gamble, 43 N. H. 465; Mackin *v.* Morse, 130 Mass. 439; Snavely *v.* Harkrader, 29 Gratt. 112; Tyson *v.* Sanderson, 45 Ala. 364; Clay *v* Clay, 3 Met. (Ky.) 548. But see Reynolds *v.* Walker, 29 Miss. 250.

[5] There are extreme cases in which a guardian would not be charged, for delaying to invest, even with simple interest, it appearing on proof that he could not do so by exercising due diligence. Brand *v.* Abbott, 42 Ala. 499; Ashley *v.* Martin, 50 Ala. 537.

[6] See language of the Master of the Rolls, in Jones *v.* Foxall, 13 E. L. & Eq. 140; Roche *v.* Hart, 11 Ves. 58.

[7] 2 Kent Com. 231, and note *ib.*, with citation of authorities. And see

Where a guardian speculates with his ward's funds, or employs them in his own business, he must account for the profits. As this is a clear breach of trust, compound interest is properly chargeable. It would seem to be the true rule in equity, where large profits, which ought to have gone to the credit of the *cestui que trust*, are appropriated by his trustee, to require them to be turned in on account; and to impose compound interest instead as a penalty only when there are practical difficulties in the way of enforcing such a rule or as a beneficial option to the ward. For it is obvious that in this country a guardian can frequently afford to pay compound interest for the use of his ward's money, if he is suffered to retain the full profits of the speculation for himself.[1] Where he loans his ward's money on usury, and thereby forfeits the whole debt, he is liable for principal and interest.[2] But this need not prevent him from investing at more than the ordinary or "legal" rate, if it be in reality lawful; and in some States he is bound to do so.[3] It has been held that where a guardian employs his ward's money in a business which he allows his son to manage, with a portion of the profits as his compensation, and the transaction is free from fraud, he is not chargeable with his son's share of the profits.[4]

While in many States the guardian's investment of his ward's moneys in stocks is illegal, and it must be his loss if the stock turn out unproductive, the tendency of the decisions is to make him liable, in case the stock proves productive, for the highest market value of the shares which he

Roche *v.* Hart, 11 Ves. 58; Robinson *v.* Robinson, 9 E. L. & Eq. 70; Light's Appeal, 24 Penn. St. 180; Kenan *v.* Hall, 8 Ga. 417; Greening *v.* Fox, 12 B. Monr. 187; Bentley *v.* Shreve, 2 Md. Ch. 215; Pettus *v.* Clauson, 4 Rich. Eq. 92; Farwell *v.* Steen, 46 Vt. 678; Finnell *v.* O'Neal, 13 Bush. 176. Compound interest should cease on the ward's arriving at full age, and simple interest only charged thereafter. Tanner *v.* Skinner, 11 Bush, 120. And, pending a judicial decree upon his final balance, he is under no obligation to invest and should not be charged interest unless he has made use of the fund or earned interest. *Re* Mott, 26 N. J. Eq. 509. Mere failure of the guardian to file annual accounts does not render him liable for compound interest. Ashley *v.* Martin, 50 Ala. 537.

[1] Spear *v.* Spear, 9 Rich. Eq. 184; Lowry *v.* State, 64 Ind. 421; Reed *v.* Timmins, 52 Tex. 84.

[2] Draper *v.* Joiner, 9 Humph. 612.

[3] Foteaux *v.* Le Page, 6 Iowa, 123; Frost *v.* Winston, 32 Mo. 489.

[4] Kyle *v.* Barnett, 17 Ala. 306.

realized or might have realized, and for all the dividends he received from them.[1]

Where the trust property is already invested on securities which would not be sanctioned by the court, the question sometimes arises how far it is the guardian's duty to call them in and invest in other securities. In this, and in matters of reinvestment, the same principles would be held to apply as to general trustees. And since such questions have arisen almost always under testamentary trusts, and not as between guardian and ward, the reader is referred to works on that subject for a full exposition of the law. We will simply add, that much is to be left to a guardian's discretion, in this and all other respects, where he manages the property of his ward on the footing of a trustee; and that he will not be held to strict account for losses occasioned in the exercise of his authority, where he has acted *bona fide*, and according to the best of his judgment, though not with all the promptitude and skill which the exigencies of the ward's situation demanded.[2]

CHAPTER VII.

SALES OF THE WARD'S REAL ESTATE.

§ 355. **In Sales of Ward's Personal Property a Liberal Rule Applies.** — The nature of personal property, its convertibility into cash, and the necessity frequently arising for changes of investment in order to make it sufficiently productive, have brought about a flexible rule so far as its purchase and sale is concerned, and no actual conversion takes place. Hence, courts of chancery at the present day assume considerable latitude in directing changes from one species of personal estate to another. Especially liberal must be the rule in

[1] French *v.* Currier, 47 N. H. 88; Lamb's Appeal, 58 Penn. St. 142; Atkinson *v.* Atkinson, 8 Allen, 15.

[2] See Hill Trustees, and Wharton's notes, 379-384. And see Perry Trusts, cs. 14, 21.

those States where the trustee is free to invest in any securities deemed proper, provided he observes prudence and good faith. Hence, too, the guardian himself may sell and reinvest his ward's personal estate, and make purchases, without a previous order of court. But this is to be considered rather the American than the English rule, since, as we have seen in the preceding chapter, a guardian's discretion is strictly limited in England, and the practice of the chancery courts in such matters is to control the property.

§ 356. **Otherwise as to Real Estate; Whether Chancery can sell Infant's Lands.** — Courts of chancery, however, have no inherent original jurisdiction to direct the sale of lands belonging to infants. The legislative power of a State may take the property of its citizens in the exercise of the right of eminent domain. But a judicial tribunal properly hesitates to assume such functions. The common law, which recognized fully the right of individuals to the enjoyment of their possessions, and particularly of real estate, without disturbance, appears to have treated lands belonging to infants as property which should be preserved intact until the owner became of sufficient age to dispose of it according to his own pleasure. Timber might be felled, and mineral ore dug out and carried away;[1] but though such acts constituted a technical conversion of real estate, they were in effect but a mode of enjoyment of the rents and profits, and the guardian was obliged to account for these products of the soil to the infant owner. Sales of the ward's lands were authorized in certain cases, as where there were debts to be paid, encumbrances to be discharged, judgments to be satisfied, and necessary repairs to be made upon the premises. But in such cases the Court of Chancery violated no rights of ownership; since it is the universal doctrine that property can only be held subordinate to the obligation of paying one's debts.[2] Courts

[1] But see Stoughton's Appeal, 88 Penn. St. 198.

[2] See Shaffner *v.* Briggs, 36 Ind. 55. On application for maintenance, chancery has jurisdiction to charge expenses of past maintenance and costs on the infant's land. *In re* Howarth, L. R. 8 Ch. 415. And see De Witte *v.* Palin, L. R. 14 Eq. 251; Nunn *v.* Hancock, L. R. 6 Ch. 850, as to jurisdiction in sale of reversionary interest of an infant.

of chancery went no further, except when authorized by statutes. They preferred that the infant's property should remain, while guardianship lasted, impressed with its original character. In the settlement of estates, personal property was to be taken to pay what was needful for support and maintenance, rather than lands. Not even purchases of real estate were favorably regarded. And when a sale became necessary, the real estate was not resorted to until other means of raising money had failed; nor was a general sale of the lands ordered whenever a partial sale would suffice.

On this subject Lord Hardwicke observed as follows, in *Taylor* v. *Philips*:[1] "There is no instance of this court's binding the inheritance of an infant by any discretionary act of the court. As to personal things, as in the composition of debts, it has been done, but never as to the inheritance; for that would be taking on the court a legislative authority, doing that which is properly the subject of a private bill." This language received the subsequent approval of Lord Chancellor Hart.[2] It has also been quoted as the recognized law in this country.[3]

§ 357. **Same Subject; English Chancery Doctrine.** — Hence, too, whenever the Court of Chancery has permitted purchases of lands, the infant's right to affirm or disaffirm on reaching majority, or, as chancery sometimes expresses it, to show cause, has been reserved. Lord Eldon lays down with great caution the power of the court in changing the infant's property, so as not to affect the infant's power over it when he comes of age.[4] And, whatever may be the rule where there is some claim or debt to be satisfied, it appears that chancery will decline ordering a sale of land belonging to an infant merely upon the ground that the sale would be beneficial to him; while in any case, if there be a material error in substance, and not in form alone, a purchaser may object

[1] 2 Ves. 23.

[2] Russell *v.* Russell, 1 Moll. 525.

[3] Rogers *v.* Dill, 6 Hill, 415. See also the learned and elaborate opinion of the court, with citation of English authorities, in Williams's Case, 3 Bland, 186; *Ex parte* Jewett, 16 Ala. 409; Thompson *v.* Brown, 4 Johns. Ch. 619; Faulkner *v.* Davis, 18 Gratt. 651.

[4] Ware *v.* Polhill, 11 Ves. 278; *Ex parte* Phillips, 19 Ves. 122.

to the title, and the court will discharge him from his contract.[1]

One objection to conversions of property, namely, that the laws of inheritance are not the same in real and personal estate, became obviated in equity by treating the proceeds throughout as impressed with the character of the original fund; a rule of large application both in England and America.[2] Another objection, upon which English writers have dwelt at length, arose under the law of testamentary dispositions, which allowed infants to give and bequeath personal estate, males at the age of fourteen, and females at twelve, while real estate could not be devised under twenty-one. Here again chancery decreed, whenever a conversion was authorized, that the right of testamentary disposition should not be thereby changed. The wills act of 1 Vict. c. 26, dispenses with this distinction in testamentary dispositions altogether.[3] And this latter objection never could have arisen in the courts of some of the United States.

§ 358. **Civil-Law Rule as to Sales of Ward's Lands.** — Guardians and tutors of minors at the civil law had power, under the direction of the proper court, as it would appear, to convey the estates of their wards.[4]

§ 359. **Sale of Ward's Lands under Legislative Authority common in the United States.** — Legislative authority may intervene to direct the absolute sale of an infant's lands. And since the ownership of real estate in this country is vested with comparatively little of that sanctity and importance which the ancient laws of primogeniture and feudal tenure threw about it, and inasmuch as purchases and sales of land

[1] See 1 Dan. Ch. Pract. 3d Am. ed. 159, 160; Calvert *v.* Godfrey, 6 Beav. 106.

[2] Wheldale *v.* Partridge, 5 Ves. 396; Macphers. Inf. 284; Story Eq. Juris. §§ 790–793, and authorities cited; 2 Kent Com. 230, and *n.*; Forman *v.* Marsh, 1 Kern. 544; Horton *v.* McCoy, 47 N. Y. 21; Fidler *v.* Higgins, 6 C. E. Green, 138; Holmes's Appeal, 53 Penn. St. 339; March *v.* Berrier, 6 Ired. Eq. 524; Huger *v.* Huger, 3 Desaus. 18. But this is not necessarily the case at law. And such proceeds lose their original character and become personalty on their first transmission, though to an infant. Dyer *v.* Cornell, 4 Barr, 359.

[3] Macphers. Inf. 278, and cases cited. See Hill on Trustees, 396, *n.*

[4] Menifee *v.* Hamilton, 32 Tex. 495.

are fast becoming matters of every-day occurrence, the legislatures of most of the United States have seen fit to enact laws for facilitating the sales of real estate by fiduciary officers. These laws are comparatively recent, and not altogether uniform in their provisions. But in most essential features they are alike. They constitute a permanent system. They may apply, not to guardians alone, but also to trustees, executors, and administrators. As cases are constantly arising under these laws, we shall here briefly notice some of the principles which have a special bearing upon the sales of real estate, so far as guardians are concerned, without deeming it necessary to make a minute analysis, since such statutes are purely local and subject to local variations.

§ 360. **American Statutes on this Subject considered.** — The American statutes relative to the sale of lands belonging to infants have the following points in common: *First*, an application to the court on the infant's behalf upon which the order of sale issues. *Second*, a special bond to be filed by the guardian. *Third*, the formal sale of the land, usually at public auction. *Fourth*, the execution of the deed to the purchaser. *Fifth*, a proper disposition of the proceeds of the sale. And in some States a judicial confirmation of the sale is required. The judicial order of sale is frequently termed a license; and the exact method of procedure is indicated in the statutes themselves.

These statutes, we may add, not unfrequently limit the purpose for which such sales may be made; as, for instance, when the ward has no other means for his education and support; or, again, to pay proper debts; or sometimes for the purpose of investing the proceeds so as to derive an income more readily. And again, the guardian to be authorized is the probate, not the natural, guardian, who besides giving the usual bond of guardianship is likewise required to give the special bond of which we speak for the purposes of the sale.[1]

[1] See Morris *v.* Morris, 2 McCart. 239; Shanks *v.* Seamonds, 24 Iowa, 131; People *v.* Circuit Judge, 19 Mich. 296. Nor is the husband of an infant a guardian, under such statutes, who can be thus authorized to sell. Dengenhart *v.* Cracraft, 36 Ohio St. 549.

And the legislative provision sometimes extends to sales of reversionary or equitable interests of minors; or, again, is limited to property in which the minor has the legal title.

As to the disposition of the proceeds, the guardian's conduct is to be regulated by the terms of his license. If he was permitted to sell for the purpose of maintenance and support, the moneys obtained must be so appropriated; if for the payment of certain debts, those debts must be paid; if for investment in other securities, he must invest therein; and, unless the court leaves the investment to his own discretion, he is bound to invest as it orders. Any other course of conduct will subject him to penalties for breach of his special bond. He is not justified in appropriating the proceeds of the sale for the above objects generally, however reasonable it might be to do so on other considerations; but for the particular object contemplated by the court in granting the license.[1] Not even the ward's assent to his disposition of the proceeds can exonerate the guardian from responsibility to other parties immediately interested, for such losses as may occur by reason of his disregard of this rule.[2] Nor is his special bond discharged by the fact that he produced the proceeds of the sale in court, and was then ordered to withdraw them; for the guardian and not the court is the proper custodian of the fund.[3] Any person not the guardian, authorized to sell in such cases, is held to account in like manner.[4]

The guardian's deed made under such orders of court has usually only the effect of a quitclaim, except so far as he may have covenanted on his part that he has complied with the statute requisites and that he is the guardian duly authorized; and in general he cannot bind his ward by any covenants of warranty in the deed, though if he choose to warrant he may bind himself. The purchaser in such sales usually takes all risks of title except as concerns the authority and good faith of the guardian in the premises.[5] But it is held that *caveat*

[1] Strong *v.* Moe, 8 Allen, 125.
[2] Harding *v.* Larned, 4 Allen, 426.
[3] State *v.* Steele, 21 Ind. 207.
[4] Pope *v.* Jackson, 11 Pick. 113.
[5] State *v.* Clark, 28 Ind. 138; Byrd *v.* Turpin, 62 Ga. 591; Holyoke *v.* Clark, 54 N. H. 578.

emptor does not apply to the purchaser so as to require him in equity to take the title where actual representations of the guardian as to the goodness of the title turn out untrue.[1]

§ 361. **Same Subject; Essentials of Purchaser's Title.** — The most difficult question which arises under the statutes relating to sales of the infant's lands, is that of the essentials of the purchaser's title. In what cases may the guardian's sale be set aside? What statute provisions shall be regarded as imperative, and what as merely directory? How far will irregularities avoid the guardian's acts, and who is at liberty to impeach them? One proposition may be laid down at the outset. It is that, inasmuch as the authority of the guardian to make, and of the court to permit, an absolute sale of the infant's lands, is limited to the grant of powers conferred by the legislature, the terms of such grant should be carefully followed. Sales made in utter disregard of the precautions wisely interposed by law are absolutely worthless.[2]

On the other hand, it must be admitted that there is always a hardship imposed upon a *bona fide* purchaser, whose rights once apparently vested are afterwards pronounced null. If the purchaser took the child's lands by collusion and fraud, or, being the guardian himself, abused his trust to secure his own profit, equity might justly suffer the transaction to be set aside altogether. But a stranger who pays his purchase-money honestly and fairly ought not to be compelled to suffer for mere irregularities under the law. For such fraudulent acts of the guardian as necessarily follow the consummation of a bargain — as the misapplication of the purchase-money — it is clear that this purchaser is not liable.[3] A sale, too, if valid when made, is not rendered invalid by the guardian's subsequent resignation and the appointment of another person in his place.[4] As to those acts which precede the consummation of a bargain the purchaser is put on his guard, unless from the very nature of the case they could not have

[1] Black *v.* Walton, 32 Ark. 321.

[2] *Ex parte* Guernsey, 21 Ill. 443; Barrett *v.* Churchill, 18 B. Monr. 387; Patton *v.* Thompson, 2 Jones Eq. 411; Mason *v.* Wait, 4 Scam. 127.

[3] Fitzgibbon *v.* Lake, 29 Ill. 165.

[4] Herndon *v.* Lancaster, 6 Bush, 483.

come to his observation. Irregularities or omissions to comply with statute formalities seem to range themselves in three classes: those which are immaterial; those which will render a sale voidable by certain parties interested; those which go to the foundation of the sale and render it void altogether. And according to the judicial construction of such irregularities and omissions, under the statutes and practice of the State, will the purchaser's title be determined.

Where the sole authority of the guardian is derived from the statute, courts will reluctantly declare any part of that statute immaterial, except in the sense that the responsibility for non-compliance is thrown upon the guardian or the court, and not upon the purchaser. Informalities in the recitals of a *bona fide* deed, defective notices, the insertion of irrelevant or superfluous matter in the order of sale, errors of the guardian in his allegations or of the court in issuing process, have been in this sense ruled as immaterial. But such cases are generally not so much of statutory direction as of judicial rule and common-law analogies in supplying the intention of the legislature where the statute was silent. The general principle prevails, that it is wise policy to sustain judicial sales, and that they should not be declared void or voidable for slight defects.[1]

Of mere irregularities advantage may often be taken by direct proceedings concerning the sale, as by appeal, while, to attack the sale and a purchaser's title collaterally, statute fundamentals should have been disregarded.

As to irregularities or omissions which will render a sale voidable, either the infant heir or some other person in interest has been unfairly dealt with. Here the privilege is accorded to the party or parties wronged, of having the sale set aside on appeal or by direct proceedings instituted for that purpose; but not in a collateral manner. We need not here speak of the infant's right of election in certain cases on attaining majority.[2] Where in general the guardian obtained

[1] Fitzgibbon *v.* Lake, 29 Ill. 165; Cooper *v.* Sunderland, 3 Iowa, 114; Thornton *v.* McGrath, 1 Duv. 349; Ackley *v.* Dygert, 33 Barb. 176.

[2] *Infra*, c. 9; Part V. c. 5.

his license without duly notifying a person in interest, such person is allowed to have the sale set aside. The purchaser's title is, however, good in the mean time. Nor can any one take advantage of the defective proceedings but those whose interests were injuriously affected. A special limit is frequently set by law to proceedings of this kind, for the sake of quieting titles; otherwise, the ordinary statute of limitations seems to apply.[1] Certain defects in a sale, too, are in some States (but not in others) treated as cured by the court's confirmation of the sale; and this more particularly where it is shown that the sale was beneficial to the ward.[2]

But as to irregularities or omissions which render the sale void altogether, there is some confusion of authority. The principle itself is a clear one, but in the application commonly made is much difficulty. Doubtless the license of a court without competent jurisdiction would be void. But where the court has jurisdiction (and this jurisdiction is usually vested originally in county courts having probate jurisdiction[3]) it is material to inquire what provisions of the statute are positive and what are declaratory. In some cases, a very strict rule seems to have been pursued; in others, the construction has been liberal in favor of the purchaser's rights. The execution of the statute bond would seem to be in general an essential; so, too, a public sale at the time set; sometimes the filing of an oath; the offer of such land as the license designates and none other; the delivery of a deed to the purchaser and receipt of the purchase-money. And yet the guardian's failure to comply with certain of these formalities does not invariably affect the purchaser's title. The difficulty is set at rest in some States by a statute provision as to the essential particulars which a *bona fide* purchaser is

[1] Kimball *v.* Fisk, 39 N. H. 110; Bryan *v.* Manning, 6 Jones, 334; Field *v.* Goldsby, 28 Ala. 218; Dutcher *v.* Hill, 29 Mo. 271; Gilmore *v.* Rodgers, 41 Penn. St. 120; Marvin *v.* Schilling, 12 Mich. 356; Kenniston *v.* Leighton, 43 N. H. 309.

[2] See Emery *v.* Vroman, 19 Wis. 689; Mahoney *v.* McGee, 4 Bush, 527: Blackman *v.* Baumann, 22 Wis. 611; Pursley *v.* Hayes, 22 Iowa, 11; Gager *v.* Henry, 5 Sawyer C. C. 237.

[3] As to courts of common pleas, for such jurisdiction, see McKeever *v.* Ball, 71 Ind. 398; Foresman *v.* Haag, 36 Ohio St. 102.

bound to notice.[1] We can only add that, in States where the legislature supplies no such provision, a purchaser cannot feel safe in disregarding any forms of procedure prescribed in so many words; and that, the more explicit the language of the statute, the more careful he should be in insisting on the prescribed course, especially as to the sale and the method of conducting it.[2]

[1] Gen. Sts. Mass. c. 102, §§ 37–48; Mohr *v.* Tulip, 51 Wis. 487.

[2] Williams *v.* Morton, 38 Me. 47; Owens *v.* Cowan, 7 B. Monr. 152; Palmer *v.* Oakley, 2 Doug. 433; Stall *v.* Macalester, 9 Ham. 19; Blackman *v.* Baumann, 22 Wis. 611; Strouse *v.* Drennan, 41 Mo. 289; Brown *v.* Christie, 27 Tex. 73; Frazier *v.* Steenrod, 7 Iowa, 339.

Due notice to those interested in the sale is essential. Knickerbocker *v.* Knickerbocker, 58 Ill. 399; Haws *v.* Clark, 37 Iowa, 355; Williamson *v.* Warren, 55 Miss. 199. But the proceeding is *in rem*, in the ward's interest; and hence notice to heirs is not always insisted upon as necessary. Mulford *v.* Beveridge, 78 Ill. 455; Gager *v.* Henry, 5 Sawyer, C. C. 237; Mohr *v.* Mahierre, 101 U. S. Supr. 417. But notice to the ward is usually requisite. Rankin *v.* Miller, 43 Iowa, 11; Kennedy *v.* Gaines, 51 Miss. 625; Musgrave *v.* Conover, 85 Ill. 374. Though the ward need not join in the petition. Cole *v.* Gourlay, 79 N. Y. 527. Jurisdiction is essential. In some States the probate court has no authority to order a sale. Summer *v.* Howard, 33 Ark. 490; see Foresman *v.* Haag, 36 Ohio St. 102. The statute which prescribes in what county application should be made for leave to sell, must be regarded. Spellman *v.* Dowse, 79 Ill. 66; Mohr *v.* Tulip, 51 Wis. 487. There is no jurisdiction to authorize a mortgage under a guardian's petition which asks for a sale. McMannis *v.* Rice, 48 Iowa, 361. The notice of public sale with a wrong time or no time stated is fatally defective. Lyon *v.* Vanatta, 35 Iowa, 521. But cf. Spring *v.* Kane, 86 Ill. 580. A sale bond is essential in some States. Stewart *v.* Bailey, 28 Mich. 251; Blauser *v.* Diehl, 90 Penn. St. 350; McKeever *v.* Ball, 71 Ind. 398. But cf. Watts *v.* Cook, 24 Kan. 278; Cuyler *v.* Wayne, 64 Ga. 78. As to requisites and sufficiency of a petition for leave to sell, there are many decisions of little more than local consequence. Discretion of a county court in ordering a sale may be controlled usually on appeal. A defective petition does not usually affect the court's jurisdiction.

There has been some conflict of cases as to whether a sale is valid without the statutory notice to persons in interest. But the present inclination upholds the sale where a proper petition was presented to the proper court, thus giving that court jurisdiction in *rem*. The sale may then bind the guardian and his ward, and all having notice and assenting, even though it might not bind parties adversely interested having no notice. For the notice is not to give jurisdiction of the subject-matter, but to get jurisdiction of persons adversely interested. Mohr *v.* Tulip, 51 Wis. 487, and cases cited.

The place of sale need not be designated. Williams *v.* Warren, 55 Miss. 199. There may be a merely defective notice, so as not to render the sale void. Lyon *v.* Vanatta, 35 Iowa, 521. A limit of sale, by appraisement or otherwise, is sometimes set. See Fraser *v.* Zylicz, 29 La. Ann. 534. Statute requirement of publication for successive weeks, how fulfilled. Dexter *v.* Cranston, 41 Mich. 448. As to adjourning the sale, see Gager *v.* Henry, 5 Sawyer C. C. 237. Defective recitals in a guardian's deed; whether the deed must be cancelled. Bobb *v.* Barnum, 59 Mo. 394.

The purchaser may sometimes maintain a bill in equity for rescinding the sale on account of illegality. But he must offer to surrender possession and to account for the use and occupation of the premises.[1] Defective proceedings are sometimes cured by the court, so as to compel him to abide by the terms of the purchase. And it seems that he may, by his laches, forfeit his right of objection to the sale.[2] And whatever the favor to be shown to a *bona fide* purchaser without notice of fatal defects in the title or misappropriation of the proceeds, one who connives at a fraud upon the ward may be held accountable for the trust property or its proceeds.[3] And a court may refuse to confirm or may set aside a sale because of gross inadequacy of price or other unfairness to the ward's interest.[4] A guardian can only safely accept money in payment of the purchase-price.[5]

Mortgages are sometimes authorized on an infant's lands, under statute proceedings analogous to those empowering a sale;[6] or the undivided interest of a minor in land, as tenant in common or otherwise.[7] Or a guardian's sale is made subject to an existing mortgage.[8]

§ 362. **American Statutes; Sales in Cases of Non-Residents.** — Where a non-resident guardian applied for the sale of real estate in Maine belonging to his ward, also a non-resident, the person authorized in that State to make the sale was ordered to transmit the proceeds to such non-

Succinct statements in such deed are sufficient. Worthington *v.* Dunkin, 41 Ind. 515. Where the court has jurisdiction, and makes an order for the sale, a *bona fide* but irregular arrangement, by the guardian with the purchaser, as to delivery of deed to carry out the terms of the sale, will not readily be regarded as invalidating the sale. Mulford *v.* Beveridge, 78 Ill. 455. The act of conveyance is rather official than personal, and may be carried out by a successor to the guardian who sold. Lynch *v.* Kirby, 36 Mich. 238.

[1] Shipp *v.* Wheeless, 33 Miss. 646; Loyd *v.* Malone, 23 Ill. 43; Anderson *v.* Layton, 3 Bush, 87.

[2] Cooper *v.* Hepburn, 15 Gratt. 551.

[3] See Wallace *v.* Brown, 41 Ind. 436, where a purchaser paid to the guardian the latter's individual notes in settlement of his purchase. And see *post*, c. 9.

[4] Mitchell *v.* Jones, 50 Mo. 438.

[5] Brenham *v.* Davidson, 51 Cal. 352.

[6] Battell *v.* Torrey, 65 N. Y. 294; Noble *v.* Runyan, 85 Ill. 618.

[7] Price, Matter of, 67 N. Y. 231; Schafer *v.* Luke, 51 Wis. 669; Brenham *v.* Davidson, 51 Cal. 352.

[8] As to the effect of such a sale, see Lynch *v.* Kirby, 36 Mich. 238.

resident guardian; but this would not be the rule in some other States.[1] Statutes have been frequently enacted by which non-resident guardians may sell their ward's lands, on petition to the court having jurisdiction, with an authenticated copy of the letters of guardianship, and compliance with the ordinary formalities of such sales; executing, perhaps, to the court having control of the funds, a bond for their proper application.[2]

§ 363. **American Chancery Rules as to Sales of Infant's Land.** — It is held in New York that the statutes of that State provide for judicial sales only in cases where the legal title is in the infant; and that, independently of such statutes, the Court of Chancery, having regard to the infant's necessities and interest, may order a sale of the equitable estate. On this principle a chancery sale was sustained, as against infants, where a trust estate of infants in lands had been transferred by a contract made between the guardian and purchaser with the approval of the court.[3] Other sales of this kind have been allowed where the legal estate was in the infant.[4] The course of procedure in that State is somewhat peculiar, and English chancery precedents are strongly favored. It is held that the part-owner of lands in which an infant is interested ought not to be allowed to make the sale.[5] So, too, the sale of a court, contrary to the provisions of a devise, is utterly void.[6] And in a late case the chancery jurisdiction over the land of infants is expressed in quite guarded language, and apparently to the effect that the court has no inherent original jurisdiction to direct such sales, but that authority must be derived from statute. Here, real estate owned by tenants in common, of whom an infant was one, was sold under and in pursuance of a judgment in a partition suit instituted by others of the tenants in common; and it was held that the

[1] Johnson *v.* Avery, 2 Fairf. 99; *contra*, Clay *v.* Brittingham, 34 Md. 675.

[2] McClelland *v.* McClelland, 7 Baxt. 210.

[3] Woods *v.* Mather, 38 Barb. 473; Anderson *v.* Mather, 44 N. Y. 249.

[4] *In re* Hazard, 9 Paige, 365.

[5] *In re* Tillotsons, 2 Edw. Ch. 113.

[6] Rogers *v.* Dill, 6 Hill, 415. See also Matter of Ellison, 5 Johns. Ch. 261; Sutphen *v.* Fowler, 9 Paige, 280.

portion of the proceeds belonging to the infant remained impressed with the character of real estate, and as such did not pass under the infant's will.[1] In some other States, chancery, by virtue of its general jurisdiction over infants and their estates, claims similar power to decree the sale of an infant's lands, whether held under a deed or will,[2] and thus to dispose even of contingent estates should occasion arise.

There are, indeed, numerous American decisions, in which the rights of infants in lands are protected in equity, so far as to give the infants opportunity to confirm or set aside the sale, and prevent them from being bound by a transaction to which they could not be parties in their own right. Instances are found in administrators' settlements to which the infant heir was not a privy, sales under decree to persons who had never paid the purchase-money, and fraudulent transactions.[3] It is held that chancery cannot interfere with the lands of infants unborn.[4] But sales made in fraud of an infant are sometimes adopted and confirmed by a court, with the purchaser's assent, as being beneficial to the infant.[5] After destruction of the records and lapse of time, the sale may be presumed to have conformed to essentials.[6] And as we shall see hereafter, length of time and laches on the infant's part after reaching majority, or his election not to avoid, may often render the transaction unimpeachable.[7]

§ 364. **Guardian's own Sale not binding; Public Sale usually required.** — In general, a guardian's sale of real estate belong-

[1] Horton *v.* McCoy, 47 N. Y. 21. And see Cole *v.* Gourlay, 79 N. Y. 527. Guardian summarily ordered to refund the excess of purchase-money in case of an error as to the extent of the infant's lands. Matter of Price, 67 N. Y. 231.

[2] Goodman *v.* Winter, 64 Ala. 410; Redd *v.* Jones, 30 Gratt. 123.

[3] Williams *v.* Duncan, 44 Miss. 376; Jones *v.* Billstein, 28 Wis. 221; Williams *v.* Wiggand, 53 Ill. 233; Terry *v.* Tuttle, 24 Mich. 206; Phillips *v.* Phillips, 50 Mo. 604; Walke *v.* Moody, 65 N. C. 599.

[4] Downin *v.* Sprecher, 35 Md. 474.

[5] *Ex parte* Kirkman, 3 Head, 517.

[6] Spring *v.* Kane, 86 Ill. 580.

[7] See *infra*, c. 9; Infancy, chs. 5 and 6; Havens *v.* Patterson, 43 N. Y. 218; Parmele *v.* McGinty, 52 Miss. 475. Infant's title under statute sale, when actually divested, see Doe *v.* Jackson, 51 Ala. 514; Shaffner *v.* Briggs, 36 Ind. 55; MacVey *v.* McVey, 51 Mo. 406; Schafer *v.* Luke, 51 Wis. 669. Land held not taxable to purchaser until conveyance is executed, confirmed, &c., even though by its terms dating back. Ordway *v.* Smith, 53 Iowa, 589.

ing to his minor ward, without an order from the court either by virtue of statute or chancery jurisdiction, is not binding upon the minor; and such ward's interest, legal or equitable, can only be divested by a public sale under proper judicial sanction;[1] though discretion is sometimes given the court as to ordering and sanctioning a private sale.[2]

CHAPTER VIII.

THE GUARDIAN'S BOND, INVENTORY, AND ACCOUNTS.

§ 365. **Guardian's Recognizance; Receiver, &c.; English Chancery Rule.** — It is the practice of the English Court of Chancery to require chancery guardians appointed on petition without suit to enter into recognizance to account. When reference is made to a master on the original petition for guardianship, he is directed to make a report approving of the security offered as well as of the person desiring the appointment. On this report the court proceeds to act. A recognizance with sureties is usually taken; but the court uses its discretion; and sometimes the personal recognizance of the guardian is deemed sufficient. This recognizance is vacated when the infant comes of age. No recognizance in modern practice is required from the guardian of the person who is appointed where the infant has been made a ward of chancery during the pendency of a suit. Nor is it given by guardians selected by the court for special purposes; as, for instance, to give formal consent to an infant's marriage under Lord Hardwicke's act. In a word, the chancery rule appears to be that guardians of the estate give security for the performance of their trust, but guardians of the person none. Special circumstances may, however, arise for requiring recognizance from the latter.[3]

[1] *Supra*, § 356; Wells *v.* Chaffin, 60 Ga. 677; Morrison *v.* Kinstra, 55 Miss. 71.

[2] Maxwell *v.* Campbell, 45 Ind. 361.

[3] Macphers. Inf. 108, 348, 553; 2 Kent Com. 227.

Since the active management of the infant's estate is frequently entrusted to a receiver, selected as an officer of the court, the latter is also bound to account annually and pay his balances into court. For performance of these duties he gives proper security; and he is allowed a salary for his services.[1]

§ 366. **American Rule; Bonds of Probate and other Guardians.** — In this country, as we have seen, most guardians of the estate are what may be termed probate guardians, deriving their authority under the appointment of courts which most resemble the old ecclesiastical courts of England. The practice which has grown up in most of the States, as well as our statute law, places guardians, therefore, in many respects, on the same footing as executors and administrators. Like such officers, they give bonds, file inventories, and render regular accounts to the court; and the same principles which apply to the one class, in these respects, apply also to the other.

A probate guardian, before receiving from the court his letters of appointment, is obliged to give bond, with good security, for the faithful performance of his trust. As such guardian is entrusted with both the person and estate of his ward, the language of his bond should be framed accordingly. In some States the statute prescribes the terms substantially as follows: To make a true inventory of the ward's estate which shall come to his possession or knowledge; to manage the property according to law and the best interests of the ward, and to discharge his trust faithfully in relation thereto; to render regular accounts to the court; and, finally, to make due settlement with the ward or other person lawfully entitled at the expiration of his trust. The bond, in case of an infant, stipulates for a faithful discharge of duties as to custody, education, and maintenance, but where the ward is an adult insane person or spendthrift, for custody and maintenance only.[2]

The penal amount of the guardian's bond, as in other cases,

[1] Macphers. Inf. 266. As to chancery practice in New York, see *In re* Morrell, 4 Paige, 44; Minor *v.* Betts, 7 Paige, 596.

[2] Smith's Prob. Pract. (Mass.) 88, 89.

is usually fixed at double the amount of the estate to be accounted for. The sureties are to be approved by the court. When such sureties are insolvent or the penal sum named in the bond is insufficient, or from any other cause the bond becomes unsatisfactory, a new bond may be ordered with such security as the court deems proper. This bond is made payable to the judge or his successors in office, and is kept on file, to be sued in behalf of the ward or by any other person who may be injured by the misconduct of the guardian while in office.[1]

A probate bond may be good, though inartifically drawn, if substantially in compliance with the statute.[2] And if it contains more than the law requires, it is nevertheless good for such portion as is lawful.[3] But, perhaps not, if it contains less. A bond is not to be avoided for slight defects committed through carelessness or error. In some instances, defective bonds have been cured in equity, so as to hold both principal and sureties, and have been made enforceable even though void at law.[4] A bond is not vitiated which contains a proper recital of the ward's name, although there be a dis-

[1] See Mass. Gen. Sts. c. 101; *ib.* c. 109; Bennett *v.* Byrne, 2 Barb. Ch. 216. A succeeding guardian may of course sue such bond. Voris *v.* State, 47 Ind. 345. The probate guardian ought to file an approved bond before being considered duly qualified. The court cannot, after appointing him guardian of one child, appoint him guardian of another subsequently, and then order the former bond to stand for both. Vanderburg *v.* Williamson, 52 Miss. 233. Some statutes hold the judge to careful inquiry into the sufficiency of sureties before accepting them. Colter *v.* McIntire, 11 Bush, 565. Delivery of a guardian's bond to the proper office cannot readily be shown, after long lapse of time, to be merely in escrow. Ordinary *v.* Thatcher, 41 N. J. L. 403. A bond filed and executed by two sureties, though calling in its premises for three, may bind the two. Ordinary *v.* Thatcher, 41 N. J. L. 403. In general, sureties as well as the guardian, are estopped by the delivered bond itself from denying its legal effect on the ground of fraud by the guardian, or arrangements with him as to other signatures, &c., to which the court, the ward, and parties to be protected by the bond were not privy. Vincent *v.* Starks, 45 Wis. 458; Sasscer *v.* Walker, 5 Gill & J. 102; State *v.* Hewitt, 72 Mo. 603; Brown *v.* Probate Judge, 42 Mich. 501. Even if the guardian's appointment was void for want of jurisdiction, the sureties are held liable with him for his *quasi* guardianship under which he obtained the property. Corbitt *v.* Carroll, 50 Ala. 315.

[2] Probate Court *v.* Strong, 27 Vt. 202; Alston *v.* Alston, 34 Ala. 15; Ordinary *v.* Heishon, 42 N. J. L. 15.

[3] Pratt *v.* Wright, 13 Gratt. 175.

[4] Wiser *v.* Blachly, 1 Johns. Ch. 607; Sikes *v.* Truitt, 4 Jones Eq. 361; Bumpus *v.* Dotson, 7 Humph. 310.

crepancy in names between the bond and letters of guardianship; and yet sureties have been relieved from liability on the ground that the ward was not named in the bond at all.[1] The true principle which distinguishes such cases seems to be that the identity of the parties should sufficiently appear.

Where there are several wards, one probate bond is sufficient for all.[2] But separate bonds for each ward would not be improper, and, in some instances, might be even preferable. The names of all the wards should be embraced in the bond, where only one is furnished.

Natural guardians are not required to give bond. Nor were guardians in socage. Nor, in England, are testamentary guardians to furnish security to the court. The reason is that these guardians were not judicially appointed nor answerable in general to the court. The same law prevails in many parts of this country.[3] But in some States testamentary guardians are treated like executors, in respect to their appointment; that is to say, the will which names them must be admitted to probate and letters issued; and the testator's appointment is made subject to judicial approval. In such cases, the testamentary guardian, like the executor, is required to give security; but he may be exempted from giving sureties, if the testator requested such exemption and the court deems it safe to grant the request.[4]

§ 367. **The Same Subject; Liability of Guardian and Sureties.** — The bond of a probate guardian renders him and his sureties liable for all estate of the ward which shall come to his possession or knowledge. This includes chattels due from the guardian to the ward at the time of his appointment or of the execution of the bond, even though the fund be the proceeds of land already sold and paid for, and the rent of real estate occupied by the guardian before that time. It embraces chattels and rents and income from every species of property

[1] Shuster *v.* Perkins, 1 Jones, 325; Greenly *v.* Daniels, 6 Bush, 41; State *v.* Martin, 69 N. C. 175; Shroyer *v.* Richmond, 16 Ohio St. 455; Richardson *v.* Boynton, 12 Allen, 138.

[2] Cranston *v.* Sprague, 3 R. I. 205; Ordinary *v.* Heishon, 42 N. J. L. 15.

[3] See *supra*, cs. 1, 2; Thomas *v.* Williams, 9 Fla. 289.

[4] See Mass. Gen. Sts. c. 109.

that the guardian actually receives in his official capacity, or that he might have received if he had faithfully performed his duties.[1] Property received from persons resident in another State is covered by the bond as much as property originally within the jurisdiction.[2] But while the property is beyond his reach, and cannot be obtained without a foreign appointment, the liability of his bondsmen would not seem to extend beyond a general dereliction of duty on his part in neglecting the proper means of obtaining it. The bond of guardians of foreign wards, appointed for recovering estate situated in their own State, binds them to account only for such property, nor can they be held liable for the custody of the wards while the latter remain non-residents. A legacy due from the executor of the ward's father, and other estate lawfully payable to the guardian by the executor, must all be accounted for, and for this the guardian's sureties are doubtless liable. But for property unlawfully received by the guardian, although he may be compelled to account for it on his personal responsibility, his sureties are not liable, since it does not come to his hands as guardian.[3] Where the guardian loans his ward's money improvidently, he and his sureties become and continue liable for it.[4]

The liability of sureties lasts while the responsibilities of the guardianship continue, and it does not terminate by the resignation or death of the guardian. For the ward's estate in the guardian's hands or subject to his control at the time of his death, they continue liable.[5] Not even the statutory limitation to suits against executors and administrators operates to relieve such sureties for the default of their deceased principal.[6] The estate of a deceased surety is liable for a de-

[1] Mattoon *v.* Cowing, 13 Gray, 387; Neill *v.* Neill, 31 Miss. 36; Bond *v.* Lockwood, 33 Ill. 212; Williams *v.* Morton, 38 Me. 47; McClendon *v.* Harlan, 2 Heisk. 337; Hunt *v.* State, 53 Ind. 321.

[2] McDonald *v.* Meadows, 1 Met. (Ky.) 507.

[3] Livermore *v.* Bemis, 2 Allen, 394; Allen *v.* Crosland, 2 Rich. Eq. 68; Ballard *v.* Brummitt, 4 Strobh. Eq. 171. As to liability where court ordered a deposit of money, see Griffith *v.* Parks, 32 Md. 1.

[4] Richardson *v.* Boynton, 12 Allen, 138.

[5] Moore *v.* Wallis, 18 Ala. 458; State *v.* Thorn, 28 Ind. 306; Ashby *v.* Johnston, 23 Ark. 163.

[6] Chapin *v.* Livermore, 13 Gray, 561; Ordinary *v.* Smith, 55 Ga. 15.

fault of the guardian which occurred after such surety's death, and before final settlement of the trust.[1] Sureties are liable so long as the official bond can be sued at all. But a surety may be discharged at any time upon his petition and after due notice to all parties interested; and thereupon the court will order the guardian to furnish new security, and, upon his failure to do so, may remove him. But such surety remains liable until the new bond is approved.[2] The personal representative of a deceased surety, it would appear, may compel the guardian to furnish new security in like manner.[3] The approval of a new bond and the discharge of a former surety terminate *ipso facto* the liability of such surety so far as new acts of the guardian are concerned, notwithstanding the security substituted may prove insufficient, or the instrument fatally defective.[4] Nor is release of a surety to be readily presumed.[5] One surety cannot be discharged from his liability without the other, unless the latter by words or acts shows his consent to remain solely responsible.[6]

The sureties on a guardian's bond, though liable, it may be, for money received by the guardian before the bond was made, are not liable for what he receives after having resigned or been removed from office.[7] And where a ward dies and the guardian administers upon his estate, the liability for the assets formerly held by the latter as guardian becomes transferred to him as administrator, and the sureties on his administration bond are made liable in place of those who were his bondsmen in the guardianship.[8] But redress for a guardian's conversion should be sought on the bond or bonds in force at the time; and the question is not when does the guardian

[1] Voris *v.* State, 47 Ind. 345; Cotton *v.* State, 64 Ind. 573. See Brooks *v.* Rayner, 127 Mass. 268.

[2] Jamison *v.* Cosby, 11 Humph. 273; Mass. Gen. Sts. c. 101; Bellune *v.* Wallace, 2 Rich. 80.

[3] Moore *v.* Wallis, 18 Ala. 458.

[4] Hamner *v.* Mason, 24 Ala. 480. See Kendrick *v.* Wilkinson, 18 Ind. 206.

[5] Wann *v.* People, 57 Ill. 202.

[6] See Newcomer's Appeal, 43 Penn. St. 43; Sebastian *v.* Bryan, 21 Ark. 447; Frederick *v.* Moore, 13 B. Monr. 470; Boyd *v.* Gault, 3 Bush, 644.

[7] Merrells *v.* Phelps, 34 Conn. 109. But as to payments made to some person by one not aware that his authority has been revoked, see Sage *v.* Hammonds, 27 Gratt. 651. See Downing *v.* Peabody, 56 Ga. 40.

[8] Baker *v.* Wood, 42 Ala. 664.

charge himself with assets, but when do they come to his possession or knowledge as guardian.[1]

Where the guardian has filed an additional bond, as in case of a large accession to the original estate, both bonds remain valid and the sureties (as such statutes are generally construed), are all deemed co-sureties, and liable as such.[2] And a bond voluntarily offered by the guardian and approved in the ordinary form is as binding as though it had been ordered by the court.[3] Where the sureties of an old bond are discharged and a new bond is substituted, the usual rule is that the old sureties and the new are liable together as co-sureties for the defaults of the guardian, previous to filing the new bond, and that the new sureties alone bear the responsibility of his subsequent misconduct.[4] But the liability of a surety on a new bond given in place of the original one is in some States treated as prospective only, on the equitable principle that, where the statute bond does not plainly express a retrospective operation, such should not be its construction.[5] Contribution is in proportion to the penal sum named in the respective bonds.

§ 368. **Same Subject.** — Many of the decisions in regard to administration bonds apply on principle to those of guardians. Thus, a bond which is not signed by the guardian is not binding even upon his sureties.[6] And if altered, after being

[1] Lowry *v.* State, 64 Ind. 421; Johnson *v.* McCullough, 59 Ga. 212.

[2] Loring *v.* Bacon, 3 Cush. 465; Commonwealth *v.* Cox, 36 Penn. St. 442; Allen *v.* State, 61 Ind. 268.

[3] Potter *v.* State, 23 Ind. 550.

[4] Loring *v.* Bacon, 3 Cush. 465; Bell *v.* Jasper, 2 Ired. Eq. 597; Hutchcraft *v.* Shrout, 1 Monr. 206; Jones *v.* Blanton, 6 Ired. Eq. 115; Ammons *v.* People, 11 Ill. 6; Sayers *v.* Cassell, 23 Gratt. 525; McGloshlin *v.* Wyatt, 1 Lea, 717; State *v.* Page, 63 Ind. 209. The language of a local code must be resorted to for the rule in such cases as to the discharge of former bondsmen from liability. See Sayers *v.* Cassell, 23 Gratt. 525. A periodical statutory bond is required in some States, and even such bonds are held to be cumulative, under the statute, as to the wards, though contribution is in inverse order of execution. Tennessee Hospital *v.* Fuqua, 1 Lea, 608. A surety is not liable for money paid the guardian on account of a ward who at the time of payment was of age. Sheton *v.* Smith, 59 Tenn. 82. A surety's contingent liability, being provable against him in bankruptcy proceedings, may thus have been avoided. Davis *v.* McCurdy, 50 Wis. 569. But not a guardian's. *Re* Maybin, 15 Bankr. Reg. 468.

[5] Lowry *v.* State, 64 Ind. 421; State *v.* Shackleford, 56 Miss. 648.

[6] Wood *v.* Washburn, 2 Pick. 24.

signed by two sureties, with the consent of the principal only, and then signed by two other sureties, ignorant of the alteration, it is not binding upon any of the sureties; not upon the two first, because altered without their consent; not upon the other two, because they were not informed of the release of the two former.[1] So joint guardians who wish to limit their respective liabilities must furnish separate bonds; since both are responsible for all the acts of each other during the continuance of the joint guardianship where they execute a joint bond.[2] And the usual rule is that no more than the penal sum named in the bond can be recovered upon it, unless it be by way of interest or costs.[3]

§ 369. **The Same Subject; Special Bond in Sales of Real Estate.** — A special bond is in many States required where a guardian is licensed to make sale of his ward's real estate. Where real estate has been sold by a guardian, and the proceeds remain unaccounted for at the expiration of his trust, it is a question whether the sureties on his general bond shall be held responsible, or those on the special bond given for sale of the real estate. The best authority is in favor of charging the latter and not the former sureties for the guardian's misapplication of such moneys.[4] The rule in Massachusetts, where a guardian, who has been licensed to sell real estate for the purpose of investment, fails to invest, and charges himself instead, in his accounts, with the proceeds and interest from year to year, has been to hold him responsible for the proceeds of the sale upon his special bond, but for the

[1] Howe *v.* Peabody, 2 Gray, 556.

[2] Brazier *v.* Clark, 5 Pick. 96; Sparhawk *v.* Buell's Adm'r, 9 Vt. 41; Boyd *v.* Boyd, 1 Watts, 365. But see Williams *v.* Harrison, 19 Ala. 277.

[3] Tyson *v.* Sanderson, 45 Ala. 364; Schouler Pers. Prop. 465-470.

[4] Williams *v.* Morton, 38 Me. 47; Brooks *v.* Brooks, 11 Cush. 22; Potter *v.* State, 23 Ind. 607; Fay *v.* Taylor, 11 Met. 529; Blauser *v.* Diehl, 90 Penn. St. 350; Madison County *v.* Johnston, 51 Iowa, 152; Henderson *v.* Coover, 4 Nev. 429; Withers *v.* Hickman, 6 B. Monr. 292. See Andrews' Heirs Case, 3 Humph. 592. In some States the requirement of an additional or special bond in such case is matter of judicial discretion. See Vanderburg *v.* Williamson, 52 Miss. 233. The court by altering the terms of sale, &c., does not impair the obligation of such bond. Stevenson *v.* State, 69 Ind. 257; Stevenson *v.* State, 71 Ind. 52. See also Colburn *v.* State, 47 Ind. 310, as to real estate sale on application of another than the guardian.

interest upon his general bond.[1] The omission to give a special bond for the sale of real estate is, on the foregoing principles, no breach of the guardian's general bond.

§ 370. **The Guardian's Inventory.** — One of the probate guardian's first duties after his appointment is to file an inventory of the ward's effects. This is a schedule, prepared by discreet and disinterested persons, and verified by their oath, wherein the amount of the ward's estate, both real and personal, together with the separate items, are duly entered at a just valuation. The inventory serves as the basis of the guardian's accounts and primarily fixes his liability. Here again the statute relative to infants borrows from the long established practice of the English ecclesiastical courts, with regard to executors and administrators. But one inventory is in general necessary; and, if subsequent effects come to the guardian's hands, he will place them in his accounts to the ward's credit. It is to be observed that though probate inventories are *prima facie* evidence of the existence of assets and their true valuation, they are by no means conclusive. And the guardian may show, in rendering his accounts, that he was not chargeable with certain items which therein appeared, or that the sale of property realized less than its appraised worth; and he will be credited accordingly. On the other hand, property omitted from the inventory, which comes within the guardian's reach in any manner, should be accounted for, as well as all gains realized over and above the appraisers' valuation. During the long period for which a guardian's authority frequently lasts, the inventory may become of little practical consequence, except as furnishing for himself the starting-point in his system of accounts, and determining, for the convenience of others interested, the fact and extent of his original liability. And as the ward's real estate is to be preserved intact unless a sale is ordered, the guardian's account, like that of an administrator, usually in this country starts with the amount of personal estate according to the inventory, taking into his reckoning only the

[1] Mattoon *v.* Cowing, 13 Gray, 387. See Pratt *v.* McJunkin, 4 Rich. 5.

income and expenditures from the real estate until some sale of land is actually made. If two or more persons under guardianship are interested in different property, or have unequal interests in the same property, separate schedules should be rendered for each.[1]

§ 371. **The Guardian's Accounts; English Chancery Practice.** — The accounts of guardians are in England subject to the direction of the Court of Chancery. Guardians and receivers who have entered into recognizance as officers of the court are compelled to present their accounts on application made by any person interested. Such proceedings are by petition, or on motion filed. Receivers are expected to pass their accounts regularly, and a guardian is compelled to account by enforcing his recognizance. The common rules as to executors and trustees apply to guardians. But unless there is misconduct shown, the guardian need not show specifically how he has used the sum allowed as maintenance. A receiver's accounts are sometimes examined on application of strangers. Mr. Macpherson says that there is scarcely a modern instance to be found where an account has been taken from a guardian without suit.[2] In like manner, equity treats as guardians all persons who take possession of an infant's estate, whether duly authorized to act or not, and obliges such persons to account, on application made by the infant himself, or on his behalf.[3]

§ 372. **Guardian's Accounts; American Practice; Periodical and Final Accounts, &c.** — Courts of equity in this country are doubtless authorized to entertain like proceedings against all *quasi* guardians.[4] But under our statutes probate guardians, duly appointed, are invariably made liable to account, in the

[1] Matter of Seaman, 2 Paige, 409; Hooker *v.* Bancroft, 4 Pick. 50; Mass. Gen. Sts. c. 100, 109; State *v.* Stewart, 36 Miss. 652; Clark *v.* Whitaker, 18 Conn. 543; Fuller *v.* Wing, 5 Shep. 222; Green *v.* Johnson, 3 Gill & Johns. 388; Fogler *v.* Buck, 66 Me. 205. And see, as to inventories generally, 1 Wms. Ex'rs, 878–883; 2 Redf. Wills. 200–205. A guardian's sureties are not precluded by the inventory from showing the true ownership of alleged assets. Sanders *v.* Forgasson, 3 Baxt. 249.

[2] Macphers. Inf. 108; *ib.* 259, 348.

[3] Macphers. Inf. 259; Story Eq. Juris. § 1195; Morgan *v.* Morgan, 1 Atk. 489.

[4] Chaney *v.* Smallwood, 1 Gill, 367; next c.

first instance, to the local court issuing letters of guardianship, which thus becomes, in fact, the general depository of accounts relative to the estates of deceased persons and wards. The immediate jurisdiction over the settlement of guardians' accounts is usually, therefore, in the probate court.

An important distinction is observable in the American practice concerning the accounts of probate guardians, between the final account and those rendered from time to time pending the minority of the ward. The rule is that these intermediate accounts, although judicially approved and passed, are by no means conclusive. They serve to show the guardian's liability and to keep the court informed of the general condition of the trust funds, to determine when the guardian's bond should be increased, and to ascertain as to the propriety of sales and investments. Such accounts remain *prima facie* evidence of the sum of the guardian's indebtedness to his ward, but nothing more.[1] The privilege remains to the ward, as we shall notice in the next chapter, of disputing their accuracy when he comes of age. But on the final account of the guardian, which is to be rendered at the expiration of his trust, the question comes before the court as to the general fairness of his management, and items allowed in former accounts may then be stricken out as improper. The reason of this is that the *cestui que trust* had no earlier opportunity of judging as to the correctness of the trustee's accounts, and ascertaining that final balance, which is, after all, the estate in controversy. So, too, a guardian in his final account should be allowed to correct errors to his prejudice, satisfactorily proved to exist in his prior accounts, both as to matters of form and substance.[2] But the final account, once examined and approved by the court, and not reversed on appeal, the ward's period of objecting to the same having also expired by limitation, such account, to-

[1] Douglas's Appeal, 82 Penn. St. 169; Bourne *v.* Maybin, 3 Woods, C. C. 724; Ashley *v.* Martin, 50 Ala. 537; Matlock *v.* Rice, 6 Heisk. 33.

[2] Crump *v.* Gerock, 40 Miss. 765; Burnham *v.* Dalling, 1 C. E. Green, 144; Willis *v.* Fox, 25 Wis. 646; Blake *v.* Pegram, 101 Mass. 592.

gether with all which preceded it, concludes all parties interested, and cannot be reopened or annulled in any court; certainly not unless by direct proceedings to obtain a reversal or setting aside for fraud or manifest error: perhaps in most States not at all.[1]

With probate guardians it is the usual practice to present accounts with vouchers annually, and in some States once in three years, or as otherwise directed by the court, the parties in interest other than the ward having been first cited, unless their approval appears upon the face of the account. The account is considered by the court and passed after due examination, upon the oath of the guardian. The vouchers are retained by the guardian, but the account is recorded and filed in the court.[2] The accounts of wards having different interests in property should be rendered separately.[3] But the fact that a guardian of two wards invested on their joint account without distinguishing their several interests is no reason why the investment should be disallowed, if sufficiently for each ward's benefit.[4] In some States the guardian's final account must embrace all items contained in his prior accounts, and not begin with the balance on the last

[1] Boynton *v.* Dyer, 18 Pick. 1; Diaper *v.* Anderson, 37 Barb. 168; Manning *v.* Baker, 8 Md. 44; Allman *v.* Owen, 31 Ala. 167; Reynolds *v.* Walker, 29 Miss. 250; State *v.* Strange, 1 Cart. 538; Stevenson's Appeal, 32 Penn. St. 318; Cummings *v.* Cummings, 128 Mass. 532; Holland *v.* State, 48 Ind. 391; Brent *v.* Grace, 30 Mo. 253; Seaman *v.* Duryea, 1 Kern. 324; Yeager's Appeal, 34 Penn. St. 173; Lynch *v.* Rotan, 39 Ill. 14; Smith *v.* Davis, 49 Md. 470. Similar rules apply often, as in settlements by executors and administrators. Irregular allowance of a guardian's account upon an alteration, and the discharge thereupon of the guardian, all without notice to the ward, cannot be permitted to deprive the latter of his rights. Buchanan *v.* Grimes, 52 Miss. 82. The administrator of a deceased ward cannot ignore a final settlement of the guardian's accounts, duly made and recorded, and cause another decree to be entered in the same court. Foust *v.* Chamblee, 51 Ala. 75. When the guardian's settlement is surcharged in equity, the particular items objectionable should be specified. Tanner *v.* Skinner, 11 Bush, 120.

[2] As to the effect of annual settlements where the public records have been destroyed, see Kidd *v.* Guibar, 63 Mo. 342. The contents may be proved by parol. *Ib.* The guardian's final account should purport on its face to be such. Bennett *v.* Hanifin, 87 Ill. 31. While in force it is an adjudication of the matters lawfully embraced therein. Briscoe *v.* Johnson, 73 Ind. 573.

[3] Armstrong *v.* Walkup, 9 Gratt. 372; State *v.* Foy, 65 N. C. 265.

[4] Nance *v.* Nance, 1 S. C. N. S. 209.

one; but the practice in this respect is not uniform in the United States.[1] Guardians sometimes make settlements out of court, rendering no returns; but this practice is not common where the infant's estate is large; nor is it safe, since the failure to account is a breach of the guardianship bond, and renders the sureties and the guardian himself liable. Any party in interest may compel the guardian to present his accounts years after the guardianship is at an end, notwithstanding he has a receipt in full from the ward; for no mere lapse of time can be set up against a trust, except that the usual limitation to suits on specialties might determine the remedies of parties aggrieved as against the guardian and his sureties.[2] But lapse of time, taken in connection with other circumstances showing a due execution of the trust, will be favorably regarded, and the guardian's account need not then be so strictly made up and proved as would be otherwise necessary.[3] Where no effects have come to the guardian's possession or knowledge, he need not file either inventory or account; but so soon as there is property his liability becomes fixed; and he cannot be exempted from account on the ground that the ward's estate does not more than balance his own outlays and expenses. The final account is not allowed by the court, until the ward has had the opportunity of examining it.[4]

But on the termination of a guardian's trust, pending the infancy of the ward, a final account is sometimes allowed after due notice to parties interested, and examination by a suitable guardian *ad litem* on the ward's behalf; and thus, too, may it be with an intermediate account; not, however, as it would usually appear, so as to absolutely debar the ward from disputing the account afterwards on reaching majority.[5]

[1] Foltz's Appeal, 55 Penn. St. 428. The last of the periodical accounts may suffice. Woodmansie *v.* Woodmansie, 32 Ohio St. 18.

[2] Clarke *v.* Clay, 11 Fost. 393; Bard *v.* Wood, 3 Met. 74; Crane *v.* Barnes, 1 Md. Ch. 151; Wade *v.* Lobdell, 4 Cush. 510; Gilbert *v.* Guptill, 34 Ill. 112. See next c.

[3] Gregg *v.* Gregg, 15 N. H. 190, Pierce *v.* Irish, 31 Me. 254; Smith *v.* Davis, 49 Md. 470.

[4] Woodbury *v.* Hammond, 54 Me. 332; Whitney *v.* Whitney, 7 S. & M. 740.

[5] See Smith Prob. Pract. 182; Racouillat *v.* Requena, 36 Cal. 651; Blake *v.* Pegram, 101 Mass. 592; Jones *v.* Fellows, 58 Ala. 343; Hutton *v.* Williams, 60 Ala. 133.

It is the duty of every guardian, whose trust as such is revoked, to account honestly to the late wards, or to his successor in the trust if there be one, for their estate. Thus, a guardian cannot discharge himself by simply turning over to his successor the latter's note for an individual debt due the guardian and taking a receipt in full; but he will still be bound in equity to the ward unless he transfers the ward's property, or money in lieu, or good securities, such as are admitted to be proper investments.[1] Permitting a guardian to resign or removing him is, of course, no judgment that a full settlement and accounting has been had.[2] And the collusive appointment of a successor, together with a collusive settlement, cannot conclude the rights of the defrauded party in interest.[3]

§ 373. **The Same Subject.** — Where the same person is both the executor of the parent's estate and guardian of the infant heir, he should first settle his executor's account, and then transfer the balance by way of distributive share to the account of guardianship.[4] Accounts of joint guardians may generally be rendered on the oath of one of them.[5] Where a guardian dies, resigns, or is removed, his final account must be presented, and it is the successor's duty to see that the former guardian is held to a strict compliance with his bond; since otherwise he may make himself liable to the ward.[6] The final account of a deceased guardian is properly presented by his personal representatives, who may be cited into court for that purpose; but for a deficit beyond the actual assets in their hands, the sureties must answer.[7] Hence

[1] Sage *v.* Hammonds, 27 Gratt. 651; Manning *v.* Manning, 61 Ga. 137; Coles *v.* Allen, 64 Ala. 98. See State *v.* Bolte, 72 Mo. 272.

[2] King *v.* Hughes, 52 Ga. 600. No such settlement is practicable, in fact, as many American codes should be construed, until at all events the ward has reached full age, or a new probate guardian is fully clothed with his office.

[3] Ellis *v.* Scott, 75 N. C. 108; Manning *v.* Manning, 61 Ga. 137.

[4] Conkey *v.* Dickinson, 13 Met. 51; Matoon *v.* Cowing, 13 Gray, 387; O'Hara *v.* Shepherd, 3 Md. Ch. 306; Crenshaw *v.* Crenshaw, 4 Rich. Eq. 14; State *v.* Tunnell, 5 Harring. 94; Runkle *v.* Gale, 3 Halst. Ch. 101; 9 Rich. Eq. 408.

[5] See Mass. Gen. Sts. c. 101. As to blending accounts as guardian and trustee, see Lewis *v.* Allred, 57 Ala. 628.

[6] Sage *v.* Hammonds, 28 Gratt. 651.

[7] Gregg *v.* Gregg, 15 N. H. 190; Royston *v.* Royston, 29 Ga. 82; Peck *v.* Braman, 2 Blackf. 141; Waterman *v.* Wright, 36 Vt. 164; Farnsworth *v.* Oliphant, 19 Barb. 30; State *v.* Grace,

the administrator of a deceased surety has been sometimes permitted to supply the missing final account.[1] The administrator of a deceased guardian cannot invest the ward's funds; nor can he discharge the guardian's general indebtedness by setting apart certain effects of the guardian's estate for that purpose.[2] Where a guardian absents himself and has left an attorney in charge of the estate, such attorney may, in Pennsylvania, be summoned by the court.[3] It would appear that a guardian cannot be cited to render a final account before the ward's majority, unless his trust has been first determined; and that his balances should, in such case, be paid to a successor and not to the court.[4]

The decree of the court allowing a partial account, wherein an item is omitted or improperly stated, does not relieve the guardian from liability for the error on his subsequent accounts. He must make the necessary correction as soon as possible. If notes are inventoried and the guardian's accounts do not charge him therein with the interest thereon, or credit him with their loss as worthless, the presumption is that he has embezzled the property or else neglected to make collections; and in either case he is chargeable for the full amount.[5] The accounts should include only transactions between guardian and ward, and should terminate with the expiration of the trust; since the relation is in other respects as between debtor and creditor.[6] Valuations should be reduced to the lawful standard of currency.[7] All items are not necessarily proved by vouchers; small charges may be allowed on the guardian's oath; and oral proof is frequently admissible as in the settlement of other probate accounts.

§ 374. **The Same Subject; Items Allowed the Guardian on Account.** — We have anticipated in former chapters the gen-

26 Mo. 87; Hemphill *v.* Lewis, 7 Bush, 214. Nor can such surety allege waste on the part of the guardian's administrator, as against the ward. Humphrey *v.* Humphrey, 79 N. C. 396.

[1] Curtis *v.* Bailey, 1 Pick. 198.

[2] Moorehead *v.* Orr, 1 S. C. N. S. 304. And see *supra*, § 314; Clark *v.* Tompkins, 1 S. C. N. S. 119.

[3] Petition of Getts, 2 Ashm. 441.

[4] Hughes *v.* Ringstaff, 11 Ala. 564; Lewis *v.* Allred, 57 Ala. 628.

[5] Starrett *v.* Jameson, 29 Me. 504.

[6] Cunningham *v.* Cunningham, 4 Gratt. 43; Crowell's Appeal, 2 Watts, 295.

[7] See McFarlane *v.* Randle, 41 Miss. 411; Neilson *v.* Cook, 40 Ala. 498.

eral principles on which guardians are considered liable in the settlement of their accounts: as for instance the payment of interest on sums not invested, losses of money and failure to collect debts; also the proper allowance for maintenance and education of infants; and other matters which come before our courts of probate jurisdiction when the accounts are presented for approval. As the guardian is allowed his costs and expenses in suits on the ward's behalf, so he may charge bills of professional counsel properly paid; and this too when the charge was fairly occasioned by a contest over his accounts, which he defended; but he cannot make the estate pay for advice and services rendered on his own account under any colorable pretext.[1] Interest has been allowed on sums of money necessarily advanced by him to his ward; and this seems reasonable.[2] And he is to be reimbursed for all reasonable and proper expenses incurred by him in the management of his ward's estate.[3] As to the guardian's own charges for the maintenance of wards, there can be no question that he is neither obliged as such to maintain his wards at his own expense, nor justified in appropriating their earnings to himself. But as the services of children and the cost of their board are always mutual offsets, the courts are reluctant to allow charges of this sort, for or against a guardian who brings up his ward in his own family; more especially where the claim seems to have been made up from afterthought, and without previous stipulation. Intention, on his

[1] McElhenny's Appeal, 46 Penn. St. 347; Alexander *v.* Alexander, 8 Ala. 796; Neilson *v.* Cook, 40 Ala. 498; State *v.* Foy, 65 N. C. 265; Blake *v.* Pegram, 101 Mass. 592; Voessing *v.* Voessing, 4 Redf. 360; Moore *v.* Shields, 69 N. C. 50. The rule in some States is strict that a guardian who is a counsellor cannot charge for professional services rendered by himself. Morgan *v.* Hannas, 49 N. Y. 667. But cf. Blake *v.* Pegram, *supra*.

[2] Hayward *v.* Ellis, 13 Pick. 272. But see Evarts *v.* Nason, 11 Vt. 122.

[3] Personal services as a mechanic or architect are ruled out strictly in some States, the guardian being restricted to his statutory commission. Morgan *v.* Hannas, 49 N. Y. 667. Other States rule differently. A guardian who keeps a store may in good faith supply the ward's necessaries, and hence charging at customary rates of profit. Moore *v.* Shields, 69 N. C. 50. The guardian of a wealthy insane adult ward may fairly claim compensation for luxuries supplied him, and for personal visits and care suitable to the ward's welfare. May *v.* May, 109 Mass. 252.

part, to maintain the ward gratuitously may be inferred from circumstances. In this sense we understand certain *dicta* of the courts to the effect that a guardian cannot charge for board where he has offered to bring up the ward at his home free of expense; for it is to be supposed that there is mutuality in all contracts, and that reasonable notice might terminate any liability which had no fixed limit.[1] Like principles are applicable to demands against the guardian for his ward's services, which courts in different States have frequently had occasion to consider.[2] A probate guardian, who is stepfather to his wards, will usually be presumed to stand to them in the place of a father, so far as liability for their support and a right to their services are concerned; and this rule may apply where he occupies their house for many years.[3] But there are circumstances under which a guardian's promise to the ward not to charge him for board would be void for want of consideration.[4] This general subject we have dwelt upon already.[5]

Rules of equity still prevail to a considerable extent so as to hold guardians accountable on the usual footing of trustees. The citation to render account in the probate court is a summary proceeding, resembling the bill in chancery for discovery. The guardian may correct mistakes, but not dispute his ward's rights at pleasure.[6] He is presumably liable to his

[1] Manning *v.* Baker, 8 Md. 44; Armstrong *v.* Walkup, 9 Gratt. 372; Hayden *v.* Stone, 1 Duv. 396; Hendry *v.* Hurst, 22 Ga. 312; Cunningham *v.* Pool, 9 Ala. 615. Owen *v.* Peebles, 42 Ala. 338, recognizes a guardian's claim for keeping his ward's horse, in a proper case. Equity disinclines to charge for a ward's maintenance for the benefit of the guardian's general creditors. Griffith *v.* Bird, 22 Gratt. 73.

[2] Phillips *v.* Davis, 2 Sneed, 520; Calhoun *v.* Calhoun, 41 Ala. 369; Crosby *v.* Crosby, 1 S. C. N. S. 337; Armstrong *v.* Walkup, 12 Gratt. 608. Among the miscellaneous items which have been allowed a guardian in his accounts may be mentioned that of *bona fide* expenses incurred in removing the ward to another State. Cummins *v.* Cummins, 29 Ill. 452.

[3] Mulhern *v.* McDavitt, 16 Gray, 404; *supra*, c. 5.

[4] Keith *v.* Miles, 39 Miss. 442.

[5] A guardian who advances money for his ward over and above the income of his estate, in order to set him up in business, without obtaining leave of the court, cannot charge his ward with it. Shaw *v.* Coble, 63 N. C. 377. Judicial consent to expenditures in excess of the income may be inferred from the court's approval of the guardian's regular accounts. Cook *v.* Rainey, 61 Ga. 452 (a statute case).

[6] *Re* Steele, 65 Ill 322.

ward for the nominal amount of debts due to the ward's estate which he has failed to collect; and if they were not, by the exercise of good business judgment, collectible for their face, he should be able to show this.[1] He is liable not only for what he actually receives, but what he ought to receive.[2] And where he or any other trustee claims credit, upon settling his account, for moneys expended, losses, or charges, the onus of proving the correctness of the credit, by vouchers or otherwise, devolves on him.[3] On the other hand the ward's estate is subject to all liabilities properly incurred in the course of the guardian's judicious management of it.[4]

§ 375. **Compensation of Guardians.** — One rule has always prevailed in England as to the compensation of executors, guardians, and other trustees; namely, that the services rendered should be treated as honorary and gratuitous. Chancery makes no allowance of any sort beyond a reimbursement for the necessary expenses actually incurred. However much the honor of being trusted may be deemed a fair equivalent for the guardian's time, trouble, and responsibility, it is not found to suffice for receivers and other officers of the Court of Chancery, whose fees may in some measure tend sensibly to diminish the ward's sense of gratitude to the custodians of his fortune. It is found necessary to allow compensation to trustees in some of the British colonies in order to induce suitable men to accept office; and even in the English courts at the present day there is a strong inclination to multiply exceptions to the general rule. Considerations of policy are alleged in support of the established doctrine of chancery; but the arguments seem not unanswerable. In this country compensation is allowed the guardian, while the probate court fees are usually trifling in comparison. And it does not appear that the English rule as to the gratuitous services of trust officers was ever adopted in a single State.[5]

[1] Seigler *v.* Seigler, 7 S. C. 317.

[2] State *v.* Womack, 72 N. C. 397; Stothoff *v.* Reed, 32 N. J. Eq. 213.

[3] Matter of Gill, 5 Thomp. & C. 237; Newman *v.* Reed, 50 Ala. 297; Hutton *v.* Williams, 60 Ala. 133.

[4] Owens *v.* Mitchell, 38 Tex. 588.

[5] See Story Eq. Juris. § 1268, and *n.*; and § 1268 *a.*; 2 Redf. Wills, 890–892; 2 Wms. Ex'rs, 1682–1685, and cases cited. In some parts of this country, custom or the local law has established

§ 376. **Suit on the Guardian's Bond for Default and Misconduct.** — For the default and misconduct of the guardian the

a commission as the guardian's compensation. In others, the statute allows what the court may deem just and reasonable. The commission allowed the guardian has varied, according to different decisions and under special circumstances, all the way from one to ten per cent, which last may be considered the maximum. Holcombe *v.* Holcombe, 2 Beasl. 415; *In re* Harland's Accounts, 5 Rawle, 323; Walton *v.* Erwin, 1 Ired. Eq. 136; Armstrong *v.* Walkup, 12 Gratt. 608. In New York, the rule established for trustees is five per cent on sums not exceeding one thousand dollars; half that amount upon all sums between that and five thousand dollars; and one per cent on all sums exceeding that amount. Matter of Roberts, 3 Johns. Ch. 43. And this rule practically obtains in many other States. One half the commission is reckoned for sums received, and one half for sums disbursed. They are to be computed by a guardian at the foot of partial accounts or about the time of actual receipt and disbursement, and not when they are brought forward upon his final account. Huffer's Appeal, 2 Grant, 341; Vanderheyden *v.* Vanderheyden, 2 Paige, 287. Where commissions at the court's discretion are allowed, special services performed by the guardian may be considered in fixing the rate of commission, but not as an additional charge. Yet it is justly observed in a Pennsylvania case, that since the guardian is a trustee for custody and management, and not, like an executor, merely for distribution, what is allowable to the one may not always suffice for the other. McElhenny's Appeal, 46 Penn. St. 347. Even in New York the unfairness of an inflexible rule, applicable to all who hold trust moneys, has led to the assertion of a doctrine in a recent case, which threatens to disturb the chancery rule, formerly considered as well settled; namely, that services of a professional or personal character, rendered the ward, may be allowed to the guardian, besides the usual commission, on the ground that they were rendered not as guardian but as an individual. Morgan *v.* Morgan, 39 Barb. 20. In Maine, Massachusetts, and other States where the court allows what is reasonable, the guardian may charge specific sums for special services, instead of or in addition to a commission, provided the whole does not exceed a fair rate of compensation. Longley *v.* Hall, 11 Pick. 120; Rathbun *v.* Colton, 15 Pick. 471; Emerson, Appellant. 32 Me. 159; Dixon *v.* Homer, 2 Met. 420; Roach *v.* Jelks, 40 Miss. 754; Evarts *v.* Nason, 11 Vt. 122. The ordinary commission is sometimes refused for disbursement of the guardian's final balance to the ward, and receipt of the original fund; nor is it allowable on the principal in mere reinvestments. Commissions may be forfeited by the guardian's misconduct: as where the fund was employed in his own business; or where he was removed from his trust; but not, in some States, for the mere omission to account until cited in. Clerk-hire is properly charged as an expense to the estate in cases of magnitude and difficulty, where such assistance is required. Vanderheyden *v.* Vanderheyden, 2 Paige, 287; Knowlton *v.* Bradley, 17 N. H. 458; Trimble *v.* Dodd, 2 Tenn. Ch. 500; Starrett *v.* Jameson, 29 Me. 504; Royston *v.* Royston, 29 Ga. 82; Magruder *v.* Darnall, 6 Gill, 269; Clowes *v.* Van Antwerp, 4 Barb. 416; Reed *v.* Ryburn, 23 Ark. 47; Neilson *v.* Cook, 40 Ala. 498; Bond *v.* Lockwood, 33 Ill. 212. Commissions are properly credited at the time the money was received. Snavely *v.* Harkrader, 29 Gratt. 112. Cf. May *v.* May, 109 Mass. 252. A guardian who is also trustee should not be allowed full commissions on both his guardian and

proper remedy is by suit on the probate bond. And such suits are brought in the name of the judge, or the State, according to the requirements of statute, for the benefit of the person or persons injured.[1] This is the usual remedy for creditors as well as the ward himself and his next of kin ; not, however, the only one open to the former, as we have already seen, according to the rule of some States.[2] In most States, the guardian's bond cannot be sued until he has been summoned before the proper court to account ; nor until leave of that court has been first obtained ; except in certain cases of debts which appear of record.[3] The reason is that the balances due from the guardian and the extent of his liability cannot be properly ascertained until the accounts are presented; moreover, the failure to account in obedience to judicial mandate, or to turn over the property according to the balance shown on such accounting, fixes the delinquency. So, too, while the guardian may sue his ward, after the latter attains majority, when it appears that the final indebtedness is in his own favor, he must wait until the court has ascertained and decreed its amount.[4]

trustee accounts, where the performance of double services is merely nominal. Blake *v.* Pegram, 101 Mass. 592. Only on sums actually collected and paid out should a guardian charge commissions. Reeds *v.* Timmins, 52 Tex. 84. Vouchers are not needed to sustain items of this character. Newman *v.* Reed, 50 Ala. 297. See 53 Vt. 460.

A guardian will not be allowed compensation for taking care of the trust fund while he himself is the borrower of it. Farwell *v.* Steen, 46 Vt. 678. And see Pierce *v.* Prescott, 128 Mass. 140. As to compensation for changing investments, repairs, &c., it is not good policy to allow it by way of a commission. May *v.* May, 109 Mass. 252.

[1] Davis *v.* Dickson, 2 Stew. 370; Potter *v.* State, 23 Ind. 607 ; Pearson *v.* McMillan, 37 Miss. 588.

[2] *Supra*, §§ 337, 343, *n.*

[3] Stillwell *v.* Miles, 19 Johns. 304; Bailey *v.* Rogers, 1 Greenl. 186; Salisbury *v.* Van Hoesen, 3 Hill, 77; Jarrett *v.* State, 5 Gill & Johns. 27; Hunt *v.* White, 1 Cart. 105; Foteaux *v.* Lepage, 6 Iowa, 123; Ammons *v.* People, 11 Ill. 6; Pratt *v.* McJunkin, 4 Rich. 5; Justices *v.* Willis, 3 Yerg. 461; O'Brien *v.* Strang, 42 Iowa, 643; Allen *v.* Tiffany, 53 Cal. 16; Hailey *v.* Boyd, 64 Ala. 399; Ordinary *v.* Heishon, 42 N. J. L. 15. But a guardian cannot prevent an action on his bond by failure to account. Wann *v.* People, 57 Ill. 202. As for chancery bill of account, in case of *quasi* guardianship, see next c. As to abatement of summary proceedings to account by the guardian's death, see Harvey *v.* Harvey, 87 Ill. 54.

[4] Smith *v.* Philbrick, 2 N. H. 395; Shollenberger's Appeal, 21 Penn. St. 337. In certain peculiar instances, where the extent of the guardian's liability has been otherwise as definitely determined as it could be by an accounting, it is held that a decree may

§ 377. **The Same Subject; Remedies against and on behalf of Sureties.** — As to sureties, it is said that they may be sued without a previous suit against the principal; the common-law rule, that an executor must first be found guilty of *devastavit*, being held inapplicable to guardians.[1] To all suits on guardians' bonds there is a limitation prescribed by law. Thus in Massachusetts the period is four years from the time the guardianship terminates, whether by death, removal, or resignation of the guardian, or the arrival of the infant ward at full age; and the same rule applies to general and special bonds.[2] In some other States the period is five years.[3] In Indiana, it is three years.[4] Where no special period is fixed by law, the ordinary limitation to suits on sealed instruments must be held to apply.[5]

Sureties, as well as the guardian, are concluded by the amount adjudged due from the guardian on settlement of his accounts.[6] They cannot become parties to the accounting of

be entered against the guardian for the amount, though no account has been taken. Sage *v.* Hammonds, 27 Gratt. 651; and even that an accounting is not a prerequisite to an action against the sureties. Girvin *v.* Hickman, 21 Hun, 316. See 55 Iowa, 110.

[1] State *v.* Strange, 1 Smith (Ind.), 367; Call *v.* Ruffin, 1 Call, 333; 1 Met. (Ky.) 22. And see Horton *v.* Horton, 4 Ired. Eq. 54; Moore *v.* Baker, 39 Ala. 704; Moore *v.* Hood, 9 Rich. Eq. 311; Potter *v.* Hiscox, 30 Conn. 508; Clark *v.* Montgomery, 23 Barb. 464.

[2] Loring *v.* Alline, 9 Cush. 68. And see Favorite *v.* Booher, 17 Ohio St. 548.

[3] Johnson *v.* Chandler, 15 B. Monr. 584.

[4] State *v.* Hughes, 15 Ind. 104.

[5] Ragland *v.* Justices, 10 Ga. 65; Woodbury *v.* Hammond, 54 Me. 332. The limitation begins to run from the time when the guardian settles his account and is ordered to pay over, not from the date of his informal accounting to the ward, the statute designating the time of a guardian's "discharge." Orleans Probate Court *v.* Child, 51 Vt. 82. Cf. Motes *v.* Madden, 14 S. C. 488.

[6] Commonwealth *v.* Rhoads, 37 Penn. St. 60. In numerous late instances however, a decree rendered against a guardian is held not conclusive against sureties who were not parties to the final accounting. So that the latter may show, in reduction of their liability, that the guardian failed to charge the wards with boarding, tuition, or his own compensation, or made improper charges in their favor against himself. Davenport *v.* Olmstead, 43 Conn. 67; State *v.* Hull, 53 Miss. 626; Kinsey *v.* State, 71 Ind. 32; State *v.* Hoster, 61 Mo. 544; Sanders *v.* Forgasson, 3 Baxt. 249. So may the sureties have the benefit of a debt lawfully chargeable in account with the ward, which the creditor releases *bona fide* to the guardian personally. Kinsey *v.* State, 71 Ind. 32.

Special penalties may be assessed under some local statutes, on a defaulting guardian's bond. Stroup *v.* State, 70 Ind. 495. Sureties cannot set up their principal's misappropriation with

their principal, either in the original proceedings or on revision.[1] Where sureties are compelled to respond in damages for the default of their guardian, they may seek indemnity from his property. Equity also allows them to enforce contribution as among themselves. Thus, if co-sureties on one bond pay the whole amount of a deficiency, they may use the other bond to obtain a proportional reimbursement.[2] So where there are three co-sureties, and one proves insolvent, the surety who has responded in damages to the full extent may compel his solvent co-surety to pay him one-half of the amount.[3] A surety may always take security from his principal for his own indemnity, and, if default occurs, reimburse himself from the principal's own property like any other creditor. But it stands to reason that the surety of a guardian cannot secure himself by any pledge of the ward's property; for this would be permitting fraud in order to prevent fraud, and the infant's pretended security would be to him no security at all.[4] In a suit against sureties on a guardianship bond, if one of the sureties is dead, his personal representatives should be joined.[5]

the ward's connivance while under age. Judge of Probate *v.* Cook, 57 N. H. 450. See also Scobey *v.* Gano, 35 Ohio St. 550.

[1] *In re* Scott's Account, 36 Vt. 297. But see Curtis *v.* Bailey, 1 Pick. 198.

[2] Commonwealth *v.* Cox, 36 Penn. St. 442. See Baugh *v.* Boles, 35 Ind. 524.

[3] Waller *v.* Campbell, 25 Ala. 544. See State *v.* Paul's Ex'r, 21 Mo. 51; Jamison *v.* Crosby, 11 Humph. 273; Hocker *v.* Woods, 33 Penn. St. 466; Haygood *v.* McKoon, 49 Mo. 77.

[4] Poultney *v.* Randall, 9 Bosw. 232; Foster *v.* Bisland, 23 Miss. 296; Miller *v.* Carnall, 22 Ark. 274; Howell *v.* Cobb, 2 Cold. 104.

[5] Lynch *v.* Rotan, 39 Ill. 14. A release of a surety by payment of an amount less than the principal owed is not a full discharge of the principal. Carroll *v.* Corbitt, 57 Ala. 579.

As to suits on a guardian's bond, on the relation of one or more wards, where there are other wards, see Colburn *v.* State, 47 Ind. 310; Scheel *v.* Eidman, 68 Ill. 193.

CHAPTER IX.

RIGHTS AND LIABILITIES OF THE WARD.

§ 378. **General Rights of the Ward.** — Having treated at length of the rights and liabilities of guardians, their appointment and removal, and the settlement of their accounts, it only remains for us to consider the powers and duties of the ward himself. Some of these have been already noticed incidentally; others, so far as minor wards are concerned, fall within the general scope of Infancy; but a few legal principles remain for discussion under the present head, to which we shall now direct the reader's attention.

§ 379. **Doctrine of Election as to Wards, Insane or Infant.** — There is a distinction to be drawn between infant wards, and insane persons or spendthrifts under guardianship. As to the former, the law recognizes a growing responsibility, as it were, on their part; a postponement of many rights and duties to the period of maturity, but not utter and total suspension or loss. Hence, sales made and contracts performed while an infant ward's disabilities last are frequently held subjected to his future approval, being treated as neither absolute nor yet void in the mean time. Hence is that principle of election so constantly asserted at law on his behalf; hence, too, the right he exercises, when of age, of passing in review accounts old and almost forgotten, to ascertain the balance justly due him. But as to insane persons and spendthrifts, their responsibilities are for the time blotted out; the disability may be temporary or it may be permanent; but while it lasts it is complete; and it may be essential that transactions on their behalf should stand or fall, irrespective of their choice, and beyond the possibility of their future interference. This suggestion we throw out simply by way of caution; for while

the same principles are constantly applied by inference to all wards alike, it is unsafe to draw broad conclusions or argue with confidence from mere analogies between these different classes of wards.[1]

§ 380. **Same Subject; Insane Persons and Infants Contrasted.** — Thus it is asked whether an insane person under guardianship can make a will, if in fact *compos mentis*. Clearly, questions of mental capacity and undue influence may arise whenever a will is presented for probate. And *prima facie* an insane person, if not a spendthrift, under guardianship, is *non compos mentis*, and his testamentary capacity may well be doubted. It is settled, however, in the State of Massachusetts that a valid will may be executed by a person under such guardianship, notwithstanding the circumstances of his situation; the fact of testamentary capacity at the date of execution being open to proof.[2] As to the contract of a spendthrift or insane person made before he was placed under guardianship, the law favors the guardian's right of disaffirmance to a certain extent, notwithstanding the ward was an adult when the contract was made; on the ground, apparently, that the person now a ward was not fit to make a contract in his own right which should bind his estate.[3] And yet the rule here must differ greatly from that applicable to infants.

§ 381. **Responsibility of Guardian to Ward as Wrong-doer, &c.** — For assault and battery, a ward, like all other persons, is entitled to damages. But where his guardian is the offender, there are technical difficulties in the way of maintaining a suit. Many authorities allow an infant to sue his guardian by next friend; but a spendthrift, it is said, cannot do so. His remedy may be found in getting the guardian removed for misconduct and securing the appointment of a successor,

[1] Thus, in Vermont, it is held that a spendthrift may be compelled to give security to the town of his settlement against loss by his becoming chargeable afterwards as a pauper, as a condition for his release from guardianship. Williston *v.* White, 11 Vt. 40.

[2] Breed *v.* Pratt, 18 Pick. 115.

[3] Coombs *v.* Janvier, 2 Vroom, 240; Chandler *v.* Simmons, 97 Mass. 508. But see, as to the wife's agency to manage his business, Motley *v.* Head, 43 Vt. 633.

or perhaps obtaining his discharge from guardianship altogether. An action can then be brought by himself or the new guardian, as the case may be. The guardian may in all cases be held criminally responsible for the injury committed.[1]

A guardian may be restrained by injunction from committing waste. So he is responsible for damages thus occasioned; and it has been held that a judgment against sureties on the guardian's bond for waste committed by the guardian will not before satisfaction bar a suit by the ward against one who participated in the waste.[2] The ward may also sue for use and occupation, although he has a general guardian.[3] Where one assumes to be guardian or agent of a guardian, and enters an infant's lands, the latter may elect to treat him as a wrongdoer, and bring trespass, or charge him as a guardian.[4] So where a guardian wrongfully holds over. But the ward cannot sue his guardian for money had and received. His proper course, at least in this country, is to institute proceedings for the latter's removal, and then to sue on the official bond.[5]

§ 382. **Ward's Action or Bill for Account; Limitations, &c.** — Whenever guardianship has been terminated, an action of account lies in favor of the ward. And this action is brought by the new guardian, or by next friend, or by the ward himself, if the period of his legal disability has expired. While his guardianship continues, chancery permits the ward by next friend to file his bill against the guardian for account. But this seems to apply rather to chancery than probate guardians; since direct proceedings for account in the court which issued letters of guardianship, followed by removal of the guardian, if unfaithful, and suit on his probate bond, afford the infant under such guardianship an ample and expeditious remedy. But for chancery guardians, purely testamentary guardians, and *quasi* guardians, and under peculiar circumstances, the more expensive and complicated process of a bill

[1] Mason *v.* Mason, 19 Pick. 506.

[2] Powell *v.* Jones, 1 Ired. Eq. 337. See Bank of Virginia *v.* Craig, 6 Leigh, 399; Hill. Injunctions, 412.

[3] Porter *v.* Bleiler, 17 Barb. 149. See Senseman's Appeal, 21 Penn. St. 331; Sawyer *v.* Knowles, 33 Me. 208. And see Chilton *v.* Cabiness, 14 Ala. 447.

[4] Sherman *v.* Ballou, 8 Cow. 304; Blomfield *v.* Eyre, 8 Beav. 250.

[5] Brooks *v.* Brooks, 11 Cush. 18.

in equity becomes the necessary resort. And this in England is still the usual course of procedure, while in most parts of the United States it has gradually gone out of use or has been superseded altogether.[1] But in some cases of *quasi* guardianship in this country, — the probate court having no jurisdiction at all in the premises, — a *quasi* ward on reaching full age has been allowed to sue in assumpsit for money in the *quasi* guardian's hands; for here, as it would appear, the old action of account was always proper.[2]

The ward's right to call his guardian to account may be barred by limitation, computed from the time he becomes competent to act. In Pennsylvania, it is said that the same principle applies as in other legal proceedings; and eighteen years' delay after the ward attains majority has been held fatal to a suit.[3] But in Illinois the rule is differently stated, and the guardian's liability to account is there considered to last as long as the bond continues in force; the citation to account before the probate court being merely a means to ascertain delinquency as the foundation of a suit, and not of itself a suit at law or in equity.[4] The former may be regarded as the true doctrine for chancery guardianship; the latter for probate guardianship. The guardian's administrator in either case should close up the trust accounts, if not already settled, before he makes distribution; since he may otherwise remain liable for many years.[5] But in most States the general subject of limitation in all trusts is expressly regulated by statute.

Short delays by the ward, after coming of age, to require accounts and institute a suit on the bond, are not to be con-

[1] Monell *v.* Monell, 5 Johns. Ch. 283; Linton *v.* Walker, 8 Fla. 144; Swan *v.* Dent, 2 Md. Ch. 111; Lemon *v.* Hansbarger, 6 Gratt. 301; Manning *v.* Manning, 61 Ga. 137; Macphers. Inf. 259, 348, Fanning *v.* Chadwick, 3 Pick. 424; Jones *v.* Beverly, 45 Ala. 161. The sureties under a void probate appointment may thus be held responsible together with the principal. Corbitt *v.* Carroll, 50 Ala. 315. As to appointing a receiver on the ward's bill for account, see Sage *v.* Hammonds, 27 Gratt. 651.

[2] Pickering *v.* De Rochemont, 45 N. H. 67; Field *v.* Torrey, 7 Vt. 372.

[3] Bones' Appeal, 27 Penn. St. 492. See Magruder *v.* Goodwyn, P. & H. 561; Adams *v.* Riviere, 59 Ga. 793.

[4] Gilbert *v.* Guptill, 34 Ill. 112. And see last c.

[5] Musser *v.* Oliver, 21 Penn. St. 362. See Felton *v.* Long, 8 Ired Eq. 224; Mitchell *v.* Williams, 27 Mo. 399; Pearson *v.* McMillan, 37 Miss. 588.

strued to the prejudice of his rights against either guardian or sureties.[1] But one who has been under guardianship is chargeable with constructive notice of the probate papers on file, and proceedings in the court relative thereto, and should prosecute his rights seasonably.[2] And special circumstances, such as a final settlement with the ward in connection with lapse of time, make the barrier stronger.[3]

§ 383. **Ward's Right to recover Embezzled Property, &c.** — Courts of chancery will always aid the ward in recovering property embezzled, concealed, or conveyed away in fraud of his rights. The proper mode of procedure is by bill in equity. And while a probate guardian suspected of fraud should be cited to account, it has been held that his estate being insolvent and his sureties irresponsible, it is not necessary for the ward to sue them before he can file a bill to recover such property as he can trace.[4] A summary process in the nature of an inquisition is provided by statute in some States, for ascertaining the whereabouts of stolen and missing property belonging to wards, by means of which all suspected persons, including the guardian himself, can be summoned before the probate court to answer lawful inquiries under oath.[5]

§ 384. **Fraudulent Transactions set aside on Ward's Behalf.** — Fraudulent transactions cannot stand as against the ward. And in cases of this sort, equity will go to the substance rather than the form, in order to ascertain the real motives of one who professes to turn over trust property to third parties, and will do equity if possible. Where a guardian, for instance, transfers a note with words importing trust to his private creditors as security for his own debt, the ward can follow it into their hands, or against other parties, and stop payment, whether sufficient consideration was paid by the holder or not.[6] But in all cases of this sort, third parties should have some notice, actual or constructive, of the existence of a trust; otherwise they cannot be made to suffer loss

[1] Pfeiffer *v.* Knapp, 17 Fla. 144.
[2] Robert *v.* Morrin, 27 Mich. 306.
[3] Railsback *v.* Williamson, 88 Ill. 494.
[4] Hill *v.* McIntire, 39 N. H. 410.
[5] Sherman *v.* Brewer, 11 Gray, 210.
[6] Lockhart *v.* Phillips, 1 Ired. Eq. 342; Lemley *v.* Atwood, 65 N. C. 46.

further than the usual rules of stolen property apply.[1] Rights of wards to real estate are frequently protected on these principles. Thus, where a mother interested in certain lands with her children obtained partition after being appointed their guardian, bought in the premises, and, without paying the full purchase-money, gave a mortgage, taking an assignment to herself as guardian, the claim of the mortgagee with notice was postponed to the children's share.[2] So where a guardian who held a mortgage in his own right agreed with the mortgagor to substitute the ward's money for his own, letting the securities remain as before, this was held to be an equitable investment of the ward's money, and good against any subsequent disposition which the guardian might make while in failing circumstances, to secure his own creditor.[3] The guardian's collusion with third parties to defeat any equity of the ward in land cannot prevail against the ward who seeks in season to set the conveyance aside.[4] And in any strong case of an illegal sale of the ward's property contrary to statute, and the conversion of the proceeds to the guardian's own use, a ward has not only his remedy upon the guardian's bond, but can repudiate the sale and recover his property.[5]

But fraud is a question of evidence. And the payment of a debt to a guardian before it is due is not sufficient in itself to establish an unfair purpose. Hence it was decided in a North Carolina case, that where one owing a bond to a guardian in failing circumstances, the bond being in behalf of the ward, and not yet due, held also a note against the guardian himself, which he gave to an attorney to collect, with explicit instructions not to make an exchange, but to collect the note given him, and with the proceeds to take up the bond due the guardian, and such attorney received a bank check from the guardian, and believing the money to be in bank, and that the check was as good as money, returned

[1] Hill *v.* Johnston, 3 Ired. Eq. 432.

[2] Messervey *v.* Barelli, 2 Hill Ch. 567.

[3] Evertson *v.* Evertson, 5 Paige, 644. In this case, the creditor had not even notice of the ward's rights. And see Gannaway *v.* Tapley, 1 Cold. 572; Robinson *v.* Robinson, 22 Iowa, 427.

[4] Beazley *v.* Harris, 1 Bush, 533. See McFarland *v.* Conlee, 44 Ill. 455.

[5] State *v.* Murray, 24 Md. 310. See *infra*, § 386.

the note to the guardian, and took up the bond in his hands, these acts having been performed in good faith, the ward could not pursue his former debtor.[1].

§ 385. **Ward's General Right to repudiate Guardian's Transactions; His Right of Election.** — We have seen that the transactions of a guardian on behalf of his infant ward are valid, if within the scope of his general powers, or authorized by the courts of equity; sustainable, though neither within the scope of his powers, nor previously authorized, if the court afterwards deems them prudent or beneficial to the ward; in other cases, subject to the ward's own disaffirmance on reaching majority. Herein consists the infant's right of election. Few acts of the guardian can be pronounced valid, except in the sense that they are authorized, either generally or specially, by the court which exercises supervision; and few of his transactions can be so utterly without authority as to be absolutely void *per se.* The general rule of election recognizes, then, two principles: first, the privilege of the infant ward, on attaining full age to avoid his guardian's transaction; second, the right of courts of equity to control this privilege by interposing to pronounce the transaction good. The whole doctrine, therefore, seems in strict accordance with that more general rule, that the accounts of the guardian are open to the inspection of the ward at majority, and may be disputed down to the smallest item. And where, as in the case of probate guardians, settlements out of court do not dispense with final returns for preservation and public record, the tendency of the decisions must be in favor of bringing the question of affirmance or disaffirmance of the guardian's transaction before the court, instead of leaving it to acts of the late ward *in pais.* These principles suffice for general application to compromises, submissions to arbitration, investments and reinvestments of personal property, and similar transactions, undertaken by the guardian on the strength of a previous order of court, or

[1] Wynne *v.* Benbury, 4 Jones Eq. 395. And see, as to fraud generally, Story Eq. Juris. §§ 317–320; Harrison *v.* Bradley, 5 Ired. Eq. 136; Dawson *v.* Massey, 1 Ball & B. 329; Henry *v.* Pennington, 11 B. Monr. 55.

at the risk of its subsequent approval.[1] Yet, statutes sometimes interpose to render such transactions absolutely perfect on permission of the court.

But as to transactions which involve the purchase or sale of real estate on the infant ward's behalf, the rule is very strict, as we have already seen. The ward is not bound even by his guardian's exchange of his lands by way of equivalent.[2] A defective sale of real estate under the statute may in some States be set aside on a bill in equity filed by the infant against the guardian and the purchasers.[3] And where the guardian contracts to buy real estate for the ward's benefit, the ward, on reaching majority, may either complete the contract or reject it, and look to the guardian for payment.[4] But he cannot, in absence of fraud, compel the vendor to refund the money paid down as a bonus.[5] Nor can he, having once renounced, seek to be relieved against such renunciation.[6] The right of election goes to the ward's personal representatives if he dies under age.[7] And it would appear to be a general principle that where the ward, after arriving of age, with full knowledge of all the facts and in the absence of fraud, receives and retains the purchase-money arising from the guardian's sale of his land, he cannot question the validity of the sale afterwards.[8] In other words, the ward may choose whether to repudiate the sale and recover the land, or ratify it and claim the purchase-money.

A resulting trust to the ward may be established, on his

[1] Barnaby *v.* Barnaby, 1 Pick. 221. See *supra*, cs. 6, 8.

[2] Morgan *v.* Johnson, 68 Ill. 190.

[3] 2 Kent Com. 230; Eckford *v.* De Kay, 8 Paige, 89; Westbrook *v.* Comstock, Walker Ch. 314. See *supra*, c. 7. As to adjustment of rents and improvements in such cases, see Anderson *v.* Layton, 3 Bush, 87; Holbrook *v.* Brooks, 33 Conn. 347; Summers *v.* Howard, 33 Ark. 490. And see Tatum *v.* Holliday, 59 Mo. 422.

[4] Loyd *v.* Malone, 23 Ill. 43; Hopk. 337.

[5] Yerger *v.* Jones, 16 How. 30.

[6] Floyd *v.* Johnson, 2 Litt. 109.

[7] Singleton *v.* Love, 1 Head, 357. Whether the right of election applies where the guardian took land in discharge of a predecessor's indebtedness, see Beam *v.* Froneberger, 75 N. C. 540; Clayton *v.* McKinnon, 54 Tex. 206.

[8] Deford *v.* Mercer, 24 Iowa, 118; Parmele *v.* McGinty, 52 Miss. 476; Shorter *v.* Frazer, 64 Ala. 74; O'Conner *v.* Carver, 12 Heisk. 436. See *post*, Part V. c. 5, as to disaffirmance by infant without restitution. See Bevis *v.* Heflin, 63 Ind. 129.

election, in lands which the guardian has taken in his own or another's name, but upon consideration out of the ward's estate.[1] And a guardian may for convenience have taken real estate or even mortgage notes or other securities in his own name, and yet by his dealings show a plain intent to hold it in trust for his ward, subject to expenses incurred in its management and accounting for its income and proceeds, and giving the ward the right to claim title by proceedings in equity or otherwise.[2]

§ 386. **Same Subject; Resulting Trusts; Guardian's Misuse of Funds; Purchase of Ward's Property, &c.** — All advantageous bargains which a guardian makes with the ward's funds are also considered subject to the ward's election, either to repudiate or to uphold the contract and take the profits. This applies, in general, to improper acts; as where the guardian speculates with the trust funds, or invests them in his own business, or, in a word, converts them to his own use. The ward may either take the investment as he finds it, with all the profits, or demand the original fund, with interest; though he cannot avoid a transaction in part and ratify in part.[3] And so as to electing to take land which has enhanced in value since the guardian took title to himself.[4] For it is right that the ward should enjoy all the advantages which have accrued from the use of his own money; and it is also right that the guardian should not derive gain from the ward's loss. The old rule of chancery in this respect has been gradually relaxed; so that many acts of a trustee, which might once have been considered fraudulent and void, are now deemed voidable only.[5]

Thus it is that the rule may now be considered well settled, that the guardian who buys at the sale of his ward's lands or

[1] Hamnett's Appeal, 72 Penn. St. 337; Pfeiffer *v.* Knapp, 17 Fla. 144; Summers *v.* Howard, 33 Ark. 490; Sterling *v.* Arnold, 54 Ga. 690; Whitehead *v.* Jones, 56 Ala. 152.

[2] Fogler *v.* Buck, 66 Me. 205.

[3] 2 Kent Com. 230; Docker *v.* Somes, 2 M. & K. 664; Kyle *v.* Barnett, 17 Ala. 306; Singleton *v.* Love, 1 Head, 357; White *v.* Parker, 8 Barb. 48; Jones *v.* Beverly, 45 Ala. 161.

[4] See Tealie *v.* Hoyte, 3 Tenn. Ch. 651.

[5] See Hill on Trustees, 159, 536.

other property is secure in his purchase, and retains all the benefits arising therefrom, unless the ward chooses to set it aside and claims to be reinstated in his own possession. This rule is laid down, however, with great caution in the courts; and it is frequently said that the transaction is treated all the same, whether the guardian bought the property outright or there was a colorable purchase by means of third parties; moreover, that such sales, in order to stand at all, must have been conducted fairly and in good faith.[1] Where the circumstances show fraud and collusion, courts of equity hesitate little in setting the transaction aside.[2] And a material question for consideration in such sales is whether a fair price was paid for the property. Parties affected with notice of the circumstances cannot complain if their title to real estate becomes thereby impaired; but it is hard that purchasers without notice should suffer. On this latter principle, and for the security of title, rests a recent decision in Massachusetts, to the effect that the guardian's purchase of his ward's real estate is voidable by the ward only as against the guardian, or a purchaser claiming under him with knowledge of the circumstances; and not as against a subsequent grantee or mortgagee without notice.[3] In general, if with the ward's funds the guardian purchases land and takes title to himself, a subsequent purchaser's rights should depend upon good faith and the question whether he had due notice of the ward's title.[4]

If the ward does not ratify an unauthorized investment, neither purity of intention nor diligence and good faith in endeavoring to prevent loss thereby will absolve the guardian

[1] 2 Kent Com. 230; Scott *v.* Freeland, 7 S. & M. 409; Doe *v.* Hassell, 68 N. C. 213; Elrod *v.* Lancaster, 2 Head, 571; Patton *v.* Thompson, 2 Jones Eq. 285; Chorpenning's Appeal, 32 Penn. St. 315. And see *supra*, cs. 6, 7.

[2] Hayward *v.* Ellis, 13 Pick. 272.

[3] Wyman *v.* Hooper, 2 Gray, 141. As to the English doctrine, see Morse *v.* Royal, 12 Ves. 372; Cary *v.* Cary, 2 Sch. &. Lef. 173; Naylor *v.* Winch, 1 Sim. & Stu. 567. Here that constructive notice which the public records furnish is probably to be deemed unavailing on the ward's behalf.

[4] Title running to the guardian as "trustee" should put such third party upon guard. Morrison *v.* Kinstra, 55 Miss. 71. And see Armitage *v.* Snowden, 41 Md. 119; Bevis *v.* Heflin, 63 Md. 129; White *v.* Izelin, 26 Minn. 487; Webster *v.* Bebinger, 70 Ind. 9.

from liability therefor.[1] But, in general, the guardian may discharge himself by turning over what securities and property he has taken in good faith and in the rightful exercise of his trust, if it remains as the result of prudent management of the estate on his part, whether valuable or worthless at the time of final settlement; his liability extending to property of the ward which has come to his actual or potential control; and securities being turned over at their just valuation, like specific corporeal chattels.[2]

For a guardian to take notes for money belonging to his ward, payable to himself in his own name, is not in law a conversion, though tending perhaps to show a conversion.[3] But in equity the ward may follow not only money belonging to him which has been invested in land by his guardian, but any specific chattel purchased with his funds, into which his funds can be clearly traced, even though the guardian took title to himself. If, however, the ward elects to take the money, such property vests absolutely in the guardian, and those standing upon the guardian's title.[4] And unless the fund can be traced into some specific thing or be clearly identified, the ward, of course, cannot assert his right therein;[5] and the usual rules apply as to *bona fide* third parties who may have meantime acquired title.

§ 387. **Transactions between Guardian and Ward; Undue Influence.** — This brings us to the general subject of transactions between the guardian and ward, from which the former derives a benefit. Here, as in the guardian's purchases, equity is not disposed to favor him. "In this class of cases," says Judge Story, "there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud."[6]

[1] May *v.* Duke, 61 Ala. 53.

[2] *Supra*, c. 6; State *v.* Foy, 71 N. C. 527; Goodson *v.* Goodson, 6 Ired. Eq. 238. Guardian held liable for carelessness in procuring the issue of an erroneous decree of distribution to the ward's injury. Pierce *v.* Prescott, 128 Mass. 140.

[3] Richardson *v.* State, 55 Ind. 381.

[4] Chanslor *v.* Chanslor, 11 Bush, 663. As to recovering the thing from third parties after an unproductive suit on the guardian's bond, see Branch *v.* De Bose, 55 Ga. 21.

[5] Vason *v.* Bell, 53 Ga. 416.

[6] Story Eq. Juris. § 307.

Equity will relieve against such transactions, on the general principle of utility, although there may not have been actual imposition; but if an improper advantage has been taken, the ground for relief is still stronger. And it is noticeable that a more stringent rule has been laid down as to guardians than applies to transactions between parent and child; for a guardian is not supposed to be influenced by that affection for his ward which parents entertain towards their own offspring, and therefore has no such powerful check upon his selfish feelings.[1]

§ 388. **Same Subject; Situation of Parties at Final Settlement of Accounts.** — Such questions generally arise at and about the time the ward attains majority, and pending the final settlement of the guardian's accounts. The English rule is very strict, and courts are extremely watchful to prevent all undue advantage at this critical period. Therefore, gifts and conveyances of the ward's property, in consideration of the guardian's services, on a final adjustment may be set aside afterward in equity, even after the ward's death. "Where the connection is not dissolved, the accounts not settled, everything remaining pressing upon the mind of the party under the care of the guardian," observes Lord Eldon, "it is almost impossible that the transaction should stand."[2] Nor are the circumstances under which the gift was made considered of much account; for the guardian's superior age and knowledge of the world, and the fact that he holds the property in his hands, place him at a decided advantage, whether he chooses to adopt a threatening tone or to impose upon the ward's mind by excessive kindness. These general principles apply, though not always in the same degree, to all others sustaining fiduciary relations; including receivers and agents who manage the property of a *cestui que trust*. And unfair advantages of every sort, which the guardian aims to secure on a final adjustment of his accounts, — whether it be in the shape of compensation or the waiver of indebtedness

[1] Pierce *v.* Waring, cited 1 Ves. 380; Hylton *v.* Hylton, 2 Ves. 547; Hatch *v.* Hatch, 9 Ves. 296. See Hill on Trustees, 157-160.

[2] Hatch *v.* Hatch, 9 Ves. 296.

incurred by his misconduct, — follow one invariable rule: that equity will relieve the ward against the consequences of his one-sided transaction.[1]

In this country the rule is somewhat different; for certain circumstances, such as the recognition that compensation of some sort is justly due a trustee for his services, may fairly contribute to relax the rule in the guardian's favor. Settlements and bargains between the guardian and ward out of court are, however, frequently set aside for corrupt influence. So are gifts and conveyances in consideration of the guardian's services; more especially when undue influence is shown from special circumstances.[2] A guardian cannot recall his own gift to his ward; though such a gift might lead the court to regard the guardian's account for expenditure with favor towards him.[3] In Pennsylvania, it is said that settlements will not stand unless full deliberation and good faith are manifest; but that a settlement made in good faith, especially if wise and prudent, cannot be impeached, after the ward's death, by his representatives.[4] This is doubtless the rule elsewhere. And the mere fact that a settlement has been made between guardian and ward, with allowances in the guardian's favor, is not conclusive of fraud, though every intendment is still to be construed on the ward's behalf.[5] Circumstances, such as great inadequacy of price in a guardian's purchase of his ward's property shortly after the latter reaches majority, would doubtless suffice, if not rebutted by ample proof of fairness, for setting aside the transaction as fraudulent.[6]

[1] Hylton *v.* Hylton, 2 Ves. 547; Wood *v.* Downes, 18 Ves. 120; Mulhallen *v.* Marum, 3 Dr. & W. 317; Aylward *v.* Kearney, 2 Ball & B. 463; Hunter *v.* Atkins, 3 M. & K. 135; Macphers. Inf. 260-264; Revett *v.* Harvey, 1 Sim. & Stu. 502; Duke of Hamilton *v.* Lord Mohun, 1 P. Wms. 118. But see Cray *v.* Mansfield, 1 Ves. Sen. 379, where gift to an agent was supported.

[2] Hall *v.* Cone, 5 Day, 513; Waller *v.* Armistead, 2 Leigh, 11; Sullivan *v.* Blackwell, 28 Miss. 737; Clowes *v.* Van Antwerp, 4 Barb. 416; Briers *v.* Hackney, 6 Ga. 419; Fridge *v.* State, 3 Gill & Johns. 103; Richardson *v.* Linney, 7 B. Monr. 571.

[3] Bond *v.* Lockwood, 33 Ill. 212; Pratt *v.* McJunkin, 4 Rich. 5.

[4] Hawkins' Appeal, 32 Penn. St. 263.

[5] Kirby *v.* Taylor, 6 Johns. Ch. 242; McClellan *v.* Kennedy, 8 Md. 230; Spalding *v.* Brent, 3 Md. Ch. 411; Meek *v.* Perry, 36 Miss. 190; Myer *v.* Rives, 11 Ala. 760.

[6] Eberts *v.* Eberts, 55 Penn. St. 110; Snell *v.* Elam, 2 Heisk. 82.

The fact that settlements out of court are not generally regarded in this country as conclusive, inasmuch as the probate guardian must still file his accounts and submit his transactions to the court, is a great safeguard against fraud. A fixed rule is established for the final adjustment of all matters in controversy between guardian and ward.[1] The chancery practice is to allow the ward a reasonable time, after attaining majority, usually one year, to reopen all accounts between himself and his guardian.[2] Hence a receipt in full, or a formal release, has been set aside as inconclusive.[3] And where the ward has made a partial inspection only, without examining the vouchers, or acted without advice, or upon imperfect knowledge of the facts, so much the greater is his equity to relief.[4] But in probate guardianship, settlements out of court usually give way to settlements in court.[5] And if the ward makes no objection to the guar-

[1] In some States the probate courts and chancery courts have concurrent jurisdiction, and the ward may at his election proceed in either forum to compel a settlement. Hailey *v.* Bond, 64 Ala. 399.

[2] Matter of Van Horne, 7 Paige, 46.

[3] But a valid release absolving from all liability to account, and in fact acquitting the guardian of liability for unauthorized acts, is in some cases recognized; the late ward having thus acted when free from undue influence and as one clearly *sui juris*. Satterfield *v.* John, 53 Ala. 127; Cheever *v.* Congdon, 34 Mich. 296.

[4] Revett *v.* Harvey, 1 Sim. & Stu. 502; Wych *v.* Packington, 3 Bro. P. C. 46; Rapalje *v.* Norsworthy, 1 Sandf. Ch. 399; Johnson *v.* Johnson, 2 Hill Ch. 277; Womack *v.* Austin, 1 S. C. N. S. 421.

[5] Although the guardian has settled with his ward on the latter's arrival at full age, he may be called afterward to file and settle his account. Marr's Appeal, 78 Penn. St. 66. The guardian must deliver to the proper party entitled. A guardian's deposit of funds with a county clerk, who afterwards defaults, held (such officer not being officially accountable for such funds) to render the guardian and his bondsman accountable and not the defaulting clerk's bondsman. Scott *v.* State, 46 Ind. 203; State *v.* Fleming, 46 Ind. 206. And this even though the court directed the guardian upon resigning to deposit thus. *Ib., sed qu.* Verbal directions of a judge of probate will not protect a guardian. Folger *v.* Heidel, 60 Mo. 284. A guardian having mortgaged as additional security for indebtedness to his ward, a suit to foreclose is no bar to proceedings for accounting against him and his sureties. Lanier *v.* Griffin, 11 S. C. 565. As to *ex parte* settlement in court, see Gravett *v.* Malone, 54 Ala. 19. A guardian's so-called account is inconclusive as such, unless submitted to and approved by the court. Beedle *v.* State, 62 Ind. 26. Judgment for money found to be due by a guardian to his ward on settlement with the ordinary must be collected by process of execution; attachment for contempt based on the failure of the guardian to pay and return of *nulla bona* does not lie. Burrow *v.* Gilbert, 58 Ga. 70. And

dian's final account as presented, or records his approval, and it is thereupon judicially approved and recorded, and appeal is not taken, no necessity for application of the chancery rule, of reopening the account, seems to exist, except upon very strong proof of fraud or error.[1] If the ward be dead

see, as to indictment, State *v.* Henry, 1 Lea, 720. Nor has the ward a lien, equitable or otherwise, upon his guardian's general estate to secure an honest management. Chanslor *v.* Chanslor, 11 Bush, 663; Vason *v.* Bell, 53 Ga. 416. As to accepting security from the guardian in lieu of the security of his bond, see Querin *v.* Carlin, 30 La. Ann. 1131.

Final settlement with infant ward duly represented by a guardian *ad litem* is as binding, as a rule, as a similar one made with an adult. Stabler *v.* Cook, 57 Ala. 22. But no final settlement of a guardian's accounts, so as to operate against the ward's rights, can be made by the court while the relation of guardian continues. Lewis *v.* Allred, 57 Ala. 628.

[1] Kittredge *v.* Betton, 14 N. H. 401; Musser *v.* Oliver, 21 Penn. St. 362; Pierce *v.* Irish, 31 Me. 254; Boynton *v.* Dyer, 18 Pick. 1; Hickman's Appeal, 7 Barr. 464; Southall *v.* Clark, 3 Stew. & Port. 338; McDow *v.* Brown, 2 S. C. N. s. 95; Bybee *v.* Tharp, 4 B. Monr. 313. Yet a bill in chancery for correction, &c., may be maintained, notwithstanding the ward's certificate approving the probate account. Monnin *v.* Beroujon, 51 Ala. 196; Bruce *v.* Doolittle, 81 Ill. 103; Lindsay *v.* Lindsay, 28 Ohio St. 157. These are matters of statute regulation. High *v.* Snedicor, 57 Ala. 403. Among decisions which apply to transactions between guardian and ward the following may be noticed. Where a guardian advances money on his ward's account, he may have an assignment of the security. Kelchner *v.* Forney, 29 Penn. St. 47. In extending time for payment of a security the guardian may sometimes arrange fairly with his ward for special compensation. Burnham *v.* Dalling, 3 C. E. Green, 132. The guardian who does not insist on surrendering good securities, properly taken, as the estate of his ward, but pays out of his own funds instead, in part, may become to a corresponding extent joint owner of the securities. Higgins *v.* McClure, 7 Bush, 379. But the guardian's own note or bond for the balance of money adjudged due on a final settlement is no payment to the ward, nor does it discharge the guardian's sureties. It is a mere postponement of final payment, and affords evidence of an admitted liability on his part. Wardlaw *v.* Gray, 2 Hill Ch. 644; Hamlin *v.* Atkinson, 6 Rand. 574. See also Douglas *v.* State, 44 Ind. 67. See Coleman *v.* Davies, 45 Ga. 489. The guardian cannot buy up an equitable encumbrance, and enforce it against the ward who is ready to refund. Taylor *v.* Taylor, 6 B. Monr. 559. The ward may release to one of joint guardians, and thus hold the sureties, Kirby *v.* Taylor, 6 Johns. Ch. 242; though this principle may be affected by general rules as to probate bonds. A receipt in full discharges only for the amount actually received by the wards, may be contradicted by parol, and binds only such wards as were authorized to give it; and its validity and effect, though under seal, may be considered in court. Witman's Appeal, 28 Penn. St. 376; Beedle *v.* State, 62 Ind. 26; Barnes *v.* Compton, 8 Gill, 391; Felton *v.* Long, 8 Ired. Eq. 224; Magruder *v.* Goodwyn, 2 P. & H. 561; Stark *v.* Gamble, 43 N. H. 465; Wade *v.* Lobdell, 4 Cush. 510. Cf. n. 3, *supra*, p. 543; 4 Redf. Surr. 310. The settlement of an insolvent guardian with his ward is sometimes protected by a court of

the guardian's settlement must be with the ward's executor or administrator; but even thus a probate guardian's settlement is usually subject to the court's revision upon his accounts.[1] In short, the proper place to seek for an accounting according to American practice, is the probate court; and the theory is that every guardian shall settle with the judge, or with a successor, or with the ward at full age; or with the ward's legal representatives, as the case may be, and upon final settlement pay over and deliver all the ward's property and balances which may thus be found due, otherwise action may be had upon his bond as for breach of condition thereof.[2] Accord and satisfaction with the adult husband of a married minor ward, which upon the theory of the old common law might have been admissible, is not to be favored in these days when a wife's separate property is so zealously protected.[3]

§ 389. **Transactions after Guardianship is ended.** — Transactions after the period of guardianship, between parties lately holding the relation of guardian and ward, especially if the ward still remains under the influence of a former guardian, may be set aside upon the same principle of constructive fraud. It is true that bargains between them are good whenever the influence is fully removed; even to gifts and conveyances in consideration of past services, the accounts having been finally closed, the property duly transferred, and the late parties to the fiduciary relation standing toward one another as man and man. Under these circumstances, the late guardian may purchase property of his late ward.[4] But such transactions are always to be regarded with suspicion.

equity as against the guardian's assignee in insolvency. Moore *v.* Hazelton, 9 Allen, 102. Statutes are found which permit the ward at full age to waive his legal right to an account and join his guardian in asking the court for a discharge. Marr's Appeal, 78 Penn. St. 66.

[1] Ordway *v.* Phelps, 45 Iowa, 279.

[2] But as to the guardian of a person formerly insane, some States hold that he may settle with his ward after the ward has recovered his reason, and need not submit his account to the probate court. Hooper *v.* Hooper, 26 Mich. 435.

[3] Married wards stand essentially upon the same footing as others, as to having accounts settled in probate court. Wing *v.* Rowe, 69 Me. 282; Monnin *v.* Beroujon, 51 Ala. 196.

[4] Oldin *v.* Samborn, 2 Atk. 15.

And where the influence still continues, as if the ward be a female, or a person of weak understanding, and the guardian continues to control the property or to furnish a home, the court is strongly disposed to set aside the bargain altogether.[1] Thus where a guardian procures the late ward's indorsement of his own notes without consideration, the parties who take such notes with knowledge of the fiduciary relationship have been enjoined from enforcing them against the indorser.[2] And if the guardian purchase rights of the late ward in his father's property for a grossly inadequate consideration, it will be set aside.[3] The circumstance that the guardian had better opportunities of acquaintance with the actual condition and value of the property than the ward himself is properly to be considered on the latter's behalf. Purchases of the guardian's property by the late ward are to be closely scrutinized in like manner.[4]

This principle applies to *quasi* guardians, even to parents. Not many years since, a young lady, who had been living for thirteen years with her mother and stepfather, joined the latter within twelve months after she became of age, at his request and under his influence, in a promissory note for which she received no consideration. The payee some years later obtained judgment at common law, and was about to take out execution, when the Court of Chancery interfered on motion, restrained the payee from enforcing his execution, and ordered the money paid into court.[5]

But the ward may be barred by the lapse of time alone, or taken in connection with his own acts, from disaffirming in law or equity his own transactions or his guardian's unauthor-

[1] See Macphers. Inf. 260; Huguenin *v.* Baseley, 14 Ves. 273; Dent *v.* Bennett, 4 M. & C. 269; Mellish *v.* Mellish, 1 Sim. & Stu. 138; Dawson *v.* Massey, 1 Ball & B. 219; Harris *v.* Carstarphen, 69 N. C. 416; Garvin *v.* Williams, 50 Mo. 206.

[2] Gale *v.* Wells, 12 Barb. 84.

[3] Wright *v.* Arnold, 14 B. Monr. 638; Williams *v.* Powell, 1 Ired. Eq. 460; Wickiser *v.* Cook, 85 Ill. 68.

[4] Sherry *v.* Sansberry, 3 Ind. 320. But as to carrying out, on arriving at age, a reasonable family arrangement, see Cowan's Appeal, 74 Penn. St. 329; *Re* Wood, 71 Mo. 623. Such transactions may be set aside against one recent fiduciary and upheld as to another, as the equity of the case may warrant. Berkmeyer *v.* Kellerman, 32 Ohio St. 239.

[5] Espey *v.* Luke, 15 E. L. & Eq. 579. And see Maitland *v.* Backhouse, 16 Sim. 58.

ized acts; though to be barred by his own acts in all such transactions, it should appear that he acted after termination of his disability, with deliberation and on full knowledge of the essential facts.[1] Thus where a guardian has exceeded his ward's income in purchasing for him a horse and buggy, there will be a ratification presumed from circumstances showing that the ward used them after majority and received the proceeds of their sale.[2] And the composition of a debt on fair terms, made between an insolvent guardian and his ward about eight years after the latter became of age, will not readily be set aside for the purpose of enabling the ward at so late a day to reach the sureties on the guardian's bond.[3] Where the late ward sets aside the transaction for undue influence he ought to refund the money, if any, which he received by way of consideration.[4]

§ 390. **Marriage of Ward against Consent of Chancery or Guardian.** — It is the rule of the English courts of chancery that no one can marry a ward of the court without its express sanction. And wherever a guardian is appointed he must give a recognizance that the infant shall not marry without its leave.[5] If a man marry a female ward without the approbation of the court, he, and all others concerned, will be treated as guilty of a contempt of court, and punished accordingly. So where there is reason to suspect an improper marriage of its wards, the court will interfere, by injunction, to prevent the marriage, to forbid all intercourse between the lovers, and even to take the ward from the custody of the guardian or any other person who is supposed guilty of connivance with the match. When an offer of marriage is made,

[1] Fish *v.* Miller, 1 Hoff. Ch. 267; Binion *v.* Miller, 27 Ga. 78; Scott *v.* Freeland, 7 S. & M. 409; Hume *v.* Hume, 3 Barr, 144; Worrell's Appeal, 23 Penn. St. 44; Sherry *v.* Sansberry, 3 Ind. 320; Penn. *v.* Heisey, 19 Ill. 295; Trader *v.* Lowe, 45 Md. 1; Ferguson *v.* Lowery, 54 Ala. 510; Singleton *v.* Love, 1 Head, 357; Macphers. Inf. 538–543; Lee *v.* Brown, 4 Ves. 361; Cory *v.* Gertcken, 2 Madd. 40; Allfrey *v.* Allfrey, 11 Jur. 981.

[2] Caffey *v.* McMichael, 64 N. C. 507. As to lapse of time as a barrier, see *supra*, § 382.

[3] Motley *v.* Motley, 45 Ala. 555.

[4] Wickiser *v.* Cook, 85 Ill. 68.

[5] Story Eq. Juris. §§ 1358–1361; Macphers. Inf. 191–209; Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 111; Smith *v.* Smith, 3 Atk. 305; Stackpole *v.* Beaumont, 3 Ves. 98; Stevens *v.* Savage, 1 Ves. Jr. 154.

the court refers it to a master to ascertain and report whether the match is suitable, and also what settlement should be made upon the ward. Where a marriage has been celebrated without leave, the court will interfere to protect the female ward against the consequences of her indiscretion, and will compel the husband to make a suitable settlement upon her. This whole subject is peculiar to the laws of England, and has no application whatever to courts of chancery in this country; unless it be that orders might issue in some cases of improvident marriage to compel the settlement of a suitable portion upon the female ward. Yet authority is wanting for the exercise of chancery jurisdiction even to this extent: so repugnant does it appear to the whole tenor of our legislation. But where property of a female ward is under the control of a court of equity, and the husband needs its assistance, a suitable provision might be compelled on her behalf; for this would be in accordance with the general law of husband and wife.[1]

[1] Kenny *v.* Udall, 5 Johns. Ch. 464, 473; s. c. 3 Cow. 591; Van Epps *v.* Van Deusen, 4 Paige, 64; Van Deusen *v.* Van Deusen, 6 Paige, 366. See also Redfield's *n.* to Story Eq. Juris. § 1361; Chambers *v.* Perry, 17 Ala. 726. The guardian of a ward who has imprudently married without his assent has been permitted, in this court, to bring a bill in equity for procuring the settlement of the ward's moderate fortune upon her, against her husband's wishes. Murphy *v.* Green, 58 Tenn. 403. Trusts for children are sometimes made with a proviso as to the child's marrying with the approbation of the trustee or testamentary guardian. See Tweedale *v.* Tweedale, 7 Ch. D. 633.

PART V.

INFANCY.

CHAPTER I.

THE GENERAL DISABILITIES OF INFANTS.

§ 391. **Age of Majority.** — All persons are infants, in legal contemplation, until they have arrived at majority. The period of majority differs in different States and countries; but this general principle remains the same.

By the civil law, full majority was not attained until the person had completed his twenty-fourth year; he was then said to be *perfectæ ætatis* — *ætatis legitimæ*.[1] This period was likewise adopted in France (though it was afterwards changed), and it prevails still in Spain, Holland, and some parts of Germany.[2] By the French civil code, the age of full capacity is twenty-one years, except that twenty-five years is the majority for contracting marriage without paternal consent, by the male, and twenty-one by the female.[3] The law of Scotland adopts the age of twenty-one.[4] Among the Greeks and early Romans, women were never of age, but subject to perpetual guardianship, except as wives; this gradually changed, and the civil law, as it stood in the time of Justinian, permitted females as well as males to attain their majority at twenty-five.[5]

[1] 1 Burge Col. & For. Laws, 113.
[2] *Ib.* 114.
[3] Code Civil, §§ 145, 488; 2 Kent Com. 233.
[4] Ersk. Inst. b. 1, tit. vii.; 1 Bl. Com. 464.
[5] Inst. 1, 23, 1; 1 Bl. Com. 464.

The common law of England, from the remotest times, has fixed twenty-one as the period of absolute majority for both sexes; or, to be more exact, an infant attains full age on the beginning of the day next preceding the twenty-first anniversary of his birth.[1] The same rule is applied in most parts of the United States, though, in some of the States, females have an enlarged capacity to act at eighteen.[2] Under the statutes of Vermont, Ohio, and Illinois, and some other Western States, females are deemed of age at eighteen.[3] The Code of Louisiana follows common-law, not civil-law, principles, and adopts twenty-one as the limitation for both sexes.[4] Thus arbitrary is the law which fixes the period of majority; nature assigning no precise and uniform period at which the disability of infancy shall cease, yet clearly indicating that there must be some such period.

A man born the first day of February, 1600, after eleven o'clock at night, was adjudged in England to be of full age after one o'clock on the morning of the last day of January, 1621.[5] This is because the common law makes no allowance for fractions of a day. But the civil law, in order to secure to the person the full protection afforded on account of his minority, did not hold the commencement of the day to be its completion, if injurious to his interests.[6] In some instances, the civil law permitted the State or sovereign to grant *venia ætatis* to full-grown persons who stood in need of it, and thus to place them constructively on the footing of infants; but nothing of the sort is recognized at common law.[7]

§ 392. **Growing Capacity during Non-age; Legislative Relief from Non-age.** — The principle of an enlarging capacity in

[1] 2 Kent Com. 233; 1 Bl. Com. 463; 1 Salk. 44; Ld. Raym. 480, 1096; 3 Wils. 274; Hamlin *v.* Stevenson, 4 Dana, 597; State *v.* Clarke, 3 Harring. 557; Wells *v.* Wells, 6 Ind. 447.

[2] 2 Kent Com. 233. See Crapster *v.* Griffith, 2 Bland Ch. 5.

[3] Sparhawk *v.* Buel, 9 Vt. 41; Stephenson *v.* Westfall, 18 Ill. 209.

[4] Louisiana Code, arts. 41, 93. This was the long-settled rule likewise in Texas. Means *v.* Robinson, 7 Tex. 502.

[5] Fitzhue *v.* Dennington, 6 Mod. 259; 1 Salk. 44, and citations in last section. And see 1 Jarm. Wills, Eng. ed. 1861, 39; Met. Contr. 38. Judge Redfield dissents from this rule. See 1 Redf. Wills. 18–20.

[6] J. Voet, lib. 4, tit. 4, n. 1.

[7] See 1 Burge Col. & For. Laws, 116, 117.

infants has been incidentally noticed. It is reasonable to suppose that they who are constantly growing become naturally competent for certain purposes long before they attain complete majority, and young men and women may well be allowed the exercise of more discretion than babes. Hence, we find that infants of suitable age are allowed to contract a valid marriage; that males of the age of fourteen and upwards, and females at the age of twelve, could once dispose of personal estate by will, and at fourteen may still choose or nominate their own guardians; that children of discretion have a voice in determining the right of custody and control. But not until attaining majority could a person at the common law convey, lease, or make contracts in general which would bind him; and the foregoing must then be considered as among the exceptions to the rule that persons are legally incapable so long as they are minors.[1]

Legislative emancipation has existed in Louisiana. In the case of an emancipated minor under such statutes, by which he is relieved from the time prescribed by law for attaining the age of majority, he is invested with all the capacities in relation to his property and obligations which he would have had he actually arrived at the age of twenty-one years. And he may be appointed administrator of an estate[2] or surety on a bond.[3] But the right of legislative emancipation seems never to have been distinctly admitted at the common law in any such sense.

§ 393. **Conflict of Laws as to True Date of Majority.**—Supposing a conflict of laws should arise over the contract of an infant by reason of the period of majority being differently assigned by the law of the domicile of his origin and that of his actual domicile, or of the situation of real property, or of the place where he has entered into a contract. The rules for such cases are these: *First*, that the actual domicile will be preferred to the domicile of birth. *Second*, that the law

[1] Co. Litt. 78 *b*, 89 *b*, and Harg. note. As to the privilege of wills, see Stat. 1 Vict. c. 26, § 7; *infra*, § 397.

[2] Succession of Lyne, 12 La. Ann. 155; Gordon *v.* Gilfoil, 99 U. S. Supr. 168. See also State *v.* Bunce, 65 Mo. 349. As to emancipation of a minor in our usual sense, see *supra*, § 267.

[3] Cooper *v.* Rhodes, 30 La. Ann. 533.

of situation of real property must prevail over that of domicile. *Third*, that the law of the place where a contract is made must prevail over that of domicile.[1]

The right of action for the recovery of real estate belonging to an infant will be governed, not by the law in force when the right of action accrued, but by the law in force when the infant became of age.[2]

§ 394. **Infant's Right of Holding Office and Performing Official Functions.** — Next, as to the infant's right of holding office. There are numerous old cases to be found in the books where an infant has been adjudged capable of holding offices that involve no pecuniary or public trust, and require only moderate skill and diligence; such as the office of park-keeper, forester, sheriff, and jailer; though on the ground apparently that such offices formerly were capable of grant, and the grantees had the power to act by deputy.[3] But the modern doctrine seems to be clear that no office of pecuniary and public responsibility can be conferred upon an infant; not so much because of mental incapacity on his part, as for the very good reason that a person who is not legally responsible for the duties of his office cannot be, in point of law, a proper person to execute them. A public office which requires the personal receipt and disbursement of money is not then to be filled by an infant.[4] Nor can an infant act as administrator, executor, or trustee, nor by his concurrence (in the absence of fraud on his part) sanction a breach of trust.[5] He cannot be a

[1] Male *v.* Roberts, 3 Esp. 163; 1 Burge Col. & For. Laws, 118 *et seq.*; Story Confl. Laws, §§ 75, 82, 332; Thompson *v.* Ketcham, 8 Johns. 189; Hierstand *v.* Kuns, 8 Blackf. 345; Saul *v.* His Creditors, 17 Martin, 597; 2 Kent Com. 233, *n.*; Huey's Appeal, 1 Grant (Penn.), 51; Wharton Confl. § 112. An order of court of another State, made in conformity to a statute of that State, and purporting to relieve an infant residing in that State from the disability of non-age, can have no operation in Missouri. State *v.* Bunce, 65 Mo. 349.

[2] Gilker *v.* Brown, 47 Mo. 105.

[3] Bac. Abr. Infancy and Age (E); 3 Mod. 222; Young *v.* Fowler, Cro. Car. 555; Macphers. Inf. 448.

[4] Claridge *v.* Evelyn, 5 B. & Ald. 81. See Crosbie *v.* Hurley, 1 Alcock & Napier, 431.

[5] Macphers. Inf. 449; Wilkinson *v.* Parry, 4 Russ. 372. But though wrongly appointed, he will be liable to account for money received by him after reaching majority. Carow *v.* Mowatt, 2 Edw. Ch. 57.

guardian, an attorney under a power (except to receive seisin), a bailiff, a factor, or a receiver.[1]

The service of a notice of replevy by an infant is, in England, illegal and void; and it would appear that he cannot be sheriff's officer.[2] But in New Hampshire it is held that an infant may be deputed to serve and return a particular writ; on the ground that while offices where judgment, discretion, and experience are essentially necessary to the proper discharge of the duties they impose, are not to be entrusted to infants, offices may be held which are merely ministerial, and require nothing more than skill and diligence.[3] But a distinction is properly taken between the case of officers of justice ordinarily liable for false return, misfeasance, and the like, and those who have no such liability; and for this reason, while, in Vermont, an infant may serve a particular writ, he cannot be specially authorized to serve mesne process by the magistrate.[4]

In ancient times minors appear to have frequently sat in the British Parliament. Thus it is related that a son of the Duke of Albemarle took part in debate when only of the age of fourteen; and history states that about the 10th James I. there were forty members not above twenty years of age, and some not above sixteen.[5] But by statute it is now provided that an infant cannot sit in the House of Lords, or vote at an election for a member of the lower house, or be elected.[6] There are provisions in the Constitution of the United States and of the different States, adopted undoubtedly because it was considered contrary to sound public policy to commit any offices requiring considerable skill and prudence, not to say pecuniary and public responsibility, to the young and immature. By the Constitution of the United States, no person can be President who has not attained the age of thirty-five years; nor a senator, who is under the age of

[1] Macphers. Inf. 448, 449; Co. Litt. 3 *b*, 172.

[2] Cuckson *v.* Winter, 2 M. & Ry. 306.

[3] Moore *v.* Graves, 3 N. H. 408. But see Tyler *v.* Tyler, 2 Root, 519.

[4] Barrett *v.* Seward, 22 Vt. 176; Harvey *v.* Hall, *ib.* 211.

[5] See Macphers. Inf. 449, *n.*; 1 Parl. Deb. 420, notes.

[6] 7 & 8 Will. III. c. 25.

thirty years; nor a representative in Congress who is not twenty-five years of age. Corresponding laws abound in the different States as to the eligibility of local officers. So is the disqualification to vote universally applied by our laws to minors, and restrictions upon the right of suffrage may extend even further.[1]

The true principle to be extracted from the authorities seems therefore to be that the court will inquire whether an infant, as such, is by law capable of discharging suitably, faithfully, and efficiently the duties of a particular office, and so as to leave open all the usual remedies to others; and this is a proper rule of guidance, the statutes being silent, rather than ancient precedents laid down as to particular offices in times when they were transmissible in families and mere sinecures.[2]

There are, undoubtedly, certain offices which an infant may properly hold. And the legislature is competent to establish an earlier or later period at which persons shall be deemed of full age for certain purposes. Hence in Massachusetts, under a law fixing eighteen years as the age for military duty, and empowering an infant at that age to enlist of his own accord, and without the parent's assent, in the militia, it is held that he may be elected company clerk, or even, as it would appear, a commissioned officer of the company.[3]

§ 395. **Infant's Responsibility for Crime.** — Infants who have arrived at sufficient maturity in years and understanding are capable of committing crimes; and it is said that they cannot plead in justification the restraint of a parent, as married women can that of the husband; although, as we presume, duress or compulsion might properly be set up in defence, wherever a young child is indicted and tried for a crime. The period of life at which a capacity of crime exists is deter-

[1] The officer who usually administers the oath of office cannot refuse to do so on such grounds. People *v.* Dean, 3 Wend. 438.

[2] For some of the old decisions as to what offices an infant might or might not hold, see Bac. Abr. Infancy and Age (E); also Moore *v.* Graves, 3 N. H. 408, *passim*.

[3] Dewey, Petitioner, 11 Pick. 265. See Hands *v.* Slaney, 8 T. R. 578. Infant may be a notary, 25 Alb. L. J. 12.

mined by law to a certain extent; for a child under seven is conclusively incapable of crime, one between seven and fourteen only *prima facie* so, and one over fourteen *prima facie* capable like any other.[1] An exception to this rule is usually stated in certain cases of physical impotence; for it is argued that a boy under fourteen years of age is physically undeveloped, and therefore cannot be legally guilty of rape or similar crimes.[2] Incapacity for committing a crime might properly be considered in connection with incapacity of criminal intent; and yet the later rule of Ohio and some other States seems the more correct one, which is to reject in such case any doctrine of conclusive presumption of incapacity, and allow evidence of criminal intent to be furnished.[3] But investigations on this point might be held *contra bonos mores*. The general rule is that capacity for crimes in persons above the age of seven years is a question of fact; the law assuming *prima facie* incapacity under fourteen, and capacity over fourteen; but subjecting that assumption to the effect of proof as to the real fact.[4]

Where a statute creates an offence, infants under the age of legal capacity are not presumed to have been included; yet where an act is denounced as a crime, even felony or treason, it extends as well to infants if above fourteen years, as to others.[5]

An infant may be indicted for obtaining goods by false pretences.[6] He is liable to bastardy process.[7] And, following the general principle already announced, children less than fourteen have been convicted for arson and murder, the

[1] 1 Bish. Crim. Law, § 460; 1 Russ. Crimes, Grea. ed 2; Marsh *v.* Loader, 14 C. B. N. S. 535. The text-writers have said that an infant can never plead constraint of the parent, but this may be doubted. See Humphrey *v.* Douglass, 10 Vt. 71; Commonwealth *v.* Mead, 10 Allen, 398; State *v.* Learnard, 41 Vt. 585.

[2] 1 Bish. Crim. Law, §§ 466, 672, and cases cited; State *v.* Handy, 4 Harring. 566; Reg. *v.* Phillips, 8 Car. & P. 736.

[3] Williams *v.* State, 14 Ohio, 222; People *v.* Randolph, 2 Parker, 174; Commonwealth *v.* Green, 2 Pick. 380.

[4] State *v.* Learnard, 41 Vt. 585; Willet *v.* Commonwealth, 13 Bush, 230.

[5] 1 Hawk. 1; 4 Bl. Com. 23; 1 Bish. Crim. Law, § 462.

[6] People *v.* Kendall, 25 Wend. 399.

[7] Chandler *v.* Commonwealth, 4 Met. (Ky.) 66.

prima facie presumption of incapacity being overcome;[1] and for perjury.[2] But a child less than seven cannot be indicted for nuisance, though owner of the land.[3] And it is reasonable to add that the evidence of malice which is to supply age ought to be strong and clear, beyond all doubt and contradiction.[4]

§ 396. **Infant's Criminal Complaint; Infant as Prosecutor.** — An infant, it is held in Tennessee, may make a criminal complaint, and be what is known as the prosecutor.[5]

§ 397. **Whether Infant may make a Will.** — The age at which persons may dispose of their property, real or personal, by last will and testament, is now determined by statute in England, and in most parts of the United States. In England, the modern statute 1 Vict. c. 26, § 7, provides that no will made by any person under the age of twenty-one years shall be valid. This went into effect in 1838.[6] And the provisions of this statute have been substantially enacted either before or since in most of the American States; so that the policy of the present day may be said to exclude the testamentary capacity of all infants.[7] Nor is this unjust; for the law itself draws up as good a will for children as they are likely to make for themselves.

But the ancient rule was otherwise: namely, to the effect that males at fourteen and females at twelve might make wills of their personal property; thus conforming to the older rule of the civil and canon law.[8] And such, as we have seen, was the age when a testamentary guardian could be appointed. But though no objection was admissible to the probate of wills in the ecclesiastical courts, merely for want

[1] See 4 Bl. Com. 23, 24; 1 Bish. Crim. Law, § 464, and cases cited; State *v.* Barton, 71 Mo. 288.

[2] Willet *v.* Commonwealth, 13 Bush, 230.

[3] People *v.* Townsend, 3 Hill, 479.

[4] See 4 Bl. Com. 24; Commonwealth *v.* Mead, 10 Allen, 398; Stephenson *v.* State, 28 Ind. 272. As to recognizance to answer for criminal offence, see State *v.* Weatherwax, 12 Kan. 463. Where a minor is imprisoned under an illegal sentence, the proper remedy is by *habeas corpus*, and not annulment of the sentence. Cathing *v.* State, 62 Ga. 243.

[5] State *v.* Dillon, 1 Head, 389.

[6] See also 20 & 21 Vict. c. 77.

[7] 1 Redf. Wills, 15–18; 4 Kent Com. 506, 507.

[8] 1 Wms. Ex'rs, 15; 1 Redf. Wills, 15–17. But there are some irreconcilable opinions on the subject to be found in the old books. See Co. Litt. 89 *b*, Hargrave's note.

of age, yet if it could be shown that the testator was not of sufficient discretion, whether of the age of fourteen, or four-and-twenty, that would overthrow the testament.[1] This always operated to discourage such wills from being made. And yet the objection was not insuperable; for there is a clear instance on record where an infant sixteen years of age made a testament in favor of his guardian and schoolmaster, which was established by evidence of the child's capacity and free will.[2]

The English text-writers, with reference to the old law, have laid it down that express approval of a former will after the infant had accomplished the years of fourteen or twelve would make it strong and effectual.[3] But as concerns the later statutes, if not as a general principle for modern times, it appears pretty clear that where a will is required to be in writing, and executed before witnesses, in order to be valid, and is thus executed before the testator arrives at the required age, it cannot be rendered valid after the testator arrives at such age, except by republication with all the usual formalities.[4] And even the old books admit that the mere circumstance of an infant having lived some time after the age when he became capable of making a will cannot alone give validity to one made during his incapacity.[5]

The maxims of the older law on this subject adhere somewhat to American jurisprudence; for we find that in many States a distinction is still made between personal and real estate as to the right of an infant to dispose of the property by will.[6]

[1] 2 Bl. Com. 497; 1 Wms. Ex'rs, 15.

[2] Arnold *v.* Earle, 2 Cas. temp. Lee, 529.

[3] 1 Wms. Ex'rs, 16; Swinb. pt. 2, § 2, pl. 7; Bac. Abr. Wills, B.

[4] 1 Redf. Wills, 19.

[5] Herbert *v.* Torball, 1 Sid. 162; Swinb. pt. 2, § 2, pl. 5; 1 Wms. Ex'rs, 16.

[6] Thus in Rhode Island, Virginia, Arkansas, and Missouri, the age for making wills of real estate is fixed at twenty-one, and for disposing of personalty in the same manner at eighteen; and in Connecticut at twenty-one for real estate, and seventeen for personalty. Among the States where the right to dispose of estate, both real and personal, is now limited to persons of full age, are Massachusetts, Vermont, New Hampshire, Maine, Ohio, Indiana, New Jersey, Kentucky, Virginia, Pennsylvania, Delaware, and Michigan. In some States, a distinction is made between males and females as to testamentary capacity, and the latter may

§ 398. **Testimony of Infants.** — Infants may be admitted to testify in the courts, if of sufficient understanding. There is no precise age at which the law excludes them on the conclusion that they are mentally and morally incompetent. By the common-law rule, every person over the age of fourteen is presumed to have common discretion and understanding until the contrary appears; but under that age it is not so presumed; and the court will therefore make inquiry as to the degree of understanding which the child offered as a witness may possess. But this preliminary examination, which is made by the judge at discretion, is to be directed to the point whether the witness comprehends the solemn obligation of an oath; and if the child appears to have sufficient natural intelligence to distinguish between good and evil, and to comprehend the nature and effect of an oath, he is an admissible witness.[1] In Indiana, a statute provides that all children over the age of ten shall be presumed to be competent. And in various States a child nearly ten years of age has been deemed competent to testify, whose answers when she was examined by the court disclosed that, though she was ignorant of the nature of the punishment for false swearing, yet she comprehended the obligations of an oath and believed that any deviation from the truth, while under oath, would be followed by appropriate punishment.[2] Less expression even than this has been required of children about this age, where the due comprehension appeared, notwithstanding nervous agitation natural to the surroundings.[3] Of the capacity of such witnesses for comprehending the matter as to which they testify, of the strength of the mem-

make wills, as in Vermont and Maryland, at eighteen. In New York and Illinois, the principle is to discriminate between real and personal estate, and between males and females; and while as young as sixteen a female in the former State may make a valid will of personalty See 1 Redf. Wills, 18 *n.*; 4 Kent Com. 506, 507; Williams *v.* Heirs, Busbee, 271; Davis *v.* Baugh, 1 Sneed, 477; Moore *v.* Moore, 23 Tex. 637; Posey *v.* Posey, 3 Strobh. 167; Corrie's Case, 2 Bland. Ch. 488.

[1] Greenl. Evid. § 367; 2 Russ. Crimes, 590; Rex *v.* Brazier, 1 East P. C. 443; State *v.* Whittier, 21 Me. 341.

[2] Blackwell *v.* State, 11 Ind. 196; Draper *v.* Draper, 68 Ill. 17; Vincent *v.* State, 3 Heisk. 120.

[3] Davidson *v.* State, 39 Tex. 129; State *v.* Scanlan, 58 Mo. 204.

ory, and in general as to the weight which may be attached to their testimony in any particular state of facts, a jury should make their estimate carefully.[1]

Children have been admitted to testify at the early age of seven, and even of five;[2] but the dying declarations of a child only four years old were once ruled out,[3] for the reason that, however precocious the child's mind, she could not have had that idea of a future state which is necessary to make such declarations admissible.[4] Different systems of religious education render the judicial test in this respect far from precise; for while there are cases where the court has put off a trial, in order to specially instruct an infant witness as to the nature and solemnity of an oath, this practice is not of late years strongly countenanced; the opinion gaining ground that the effect of the oath upon the conscience should arise from religious feelings of a permanent nature and gradual growth.[5] But in cases where the intellect is sufficiently matured, but the education only has been neglected, it appears that a postponement of the trial might properly be asked.[6]

[1] Competence to testify is not inconsistent with civil immunity at such an age for perjury. Johnson *v.* State, 61 Ga. 35. See Peterson *v.* State, 47 Ga. 524.

[2] *Ib.* Female child of eight held a competent witness in prosecution for a criminal assault upon her. Wade *v.* State, 50 Ala. 164.

[3] Rex *v.* Pike, 3 Car. & P. 598; Rex *v.* Brazier, 1 East P. C. 443.

[4] Rex *v.* Pike, 3 Car. & P. 598. And see Rex *v.* Brazier, 1 East P. C. 443; 1 Greenl. Evid. § 367; Commonwealth *v.* Hutchinson, 10 Mass. 225.

[5] Rex *v.* White, 2 Leach C. C. 48, *n.*; 1 Greenl. Evid. § 367; Rex *v.* Williams, 7 Car. & P. 320; Regina *v.* Nicholas, 2 Car. & K. 246.

[6] Per Pollock, C. B., Regina *v.* Nicholas, *ib.* With regard to the weight and effect of the testimony of children, Blackstone observes that when the evidence of children is admitted, "it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion." 4 Bl. Com. 214. To this Mr. Phillips replies that in many cases, undoubtedly, the statements of children are to be received with great caution; yet that a prisoner may be convicted upon such testimony alone and unsupported; and that the extent of corroboration necessary is a question exclusively for a jury. It may be observed that the preliminary inquiry as to the competency is not always of the most satisfactory description, and is such that a child might, upon slight practising of the memory, appear well qualified. The severest test appears in the examination which follows; and

On the principle that chancery is bound to see that an infant litigant's rights and interests are protected, not only is an unwilling infant not compellable to testify in his suit, but his deposition, though given freely on his part, may be suppressed, at the discretion of the court, as containing admissions unfavorable to his cause.[1]

§ 399. **Marriage Settlements of Infants.** — With respect to the marriage settlement of infants, there was formerly considerable controversy. For, on the one hand, it was urged that infants were in general incapable of entering into valid contracts with respect to their property; on the other, that since infants might make a valid contract of marriage, they ought to be able to arrange the preliminaries. At an early period the opinion prevailed in England that the marriage consideration communicated to the contracts of infants, respecting their estate, an efficacy similar to that which the law stamps upon marriage itself; and Lords Hardwicke and Macclesfield contributed to strengthen it, by maintaining that the real estate of an infant would be bound by a marriage settlement.[2] Lord Northington later held to a different opinion; and Lord Thurlow overturned the doctrine altogether, boldly declaring that the contracts of male and female infants do not bind their estates, and that consequently a female infant cannot be bound by any articles entered into during minority, as to her real estate; but may refuse to be bound, and abide by the interest the law casts upon her, which nothing but her own act after the period of majority can fetter or affect.[3] Other distinguished equity jurists, including Lord Eldon, subsequently expressed their approval of Lord Thurlow's

as Mr. Phillips well concludes, "Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; what is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive." 1 Phil. Evid. 9th ed. 6, 7.

[1] Serle *v.* St. Eloy, 2 P. Wms. 386; Napier *v.* Effingham, 2 P. Wms. 403; Moore *v.* Moore, 4 Sandf. Ch. 37. But see Walker *v.* Thomas, 2 Dick. 781; Bennett *v.* Welder, 15 Ind. 332.

[2] Harvey *v.* Ashley, 3 Atk. 607; Cannel *v.* Buckle, 2 P. Wms. 243; Peachey Mar. Settl. 25 *et seq.*

[3] Drury *v.* Drury, 2 Eden, 58; Durnford *v.* Lane, 1 Bro. C. C. 115; Clough *v.* Clough, 5 Ves. 716.

decision.[1] And the rule became settled within the last fifty years, that the real estate of a female infant was not bound by the settlement on her marriage, because her real estate does not become by the marriage the absolute property of the husband, although by the marriage he takes a limited interest in it.[2] So was it decided that neither the approbation of the parents or guardians, nor even of the court of chancery, independently of positive statute, would make the infant's settlements binding.[3] The inconvenience of such a state of things called for statute remedy; and in 1855 an act was passed which enabled male infants not under twenty, and female infants not under seventeen, with the approbation of the court of chancery, to make valid settlements of all their property, real or personal, and whether in possession, reversion, remainder, or expectancy.[4] The statute has already received some interpretation in the courts; and so much in favor was it, that almost immediately upon its passage it was acted upon in chancery.

This subject has received little attention in the United States; notwithstanding the plenary jurisdiction over the estates and persons of infants which a court of equity is admitted to exercise in many of our States. But in New York some decisions have been made, of a like tenor with those in the English chancery. Thus, in 1831, that a legal jointure settled upon an infant would bar her dower; and, by analogy to the statute, a competent and certain provision settled upon the infant in bar of dower, to which there is no

[1] See Peachey Mar. Settl. 28; Milner *v.* Lord Harewood, 18 Ves. 275; Caruthers *v.* Caruthers, 4 Bro. C. C. 509.

[2] Simson *v.* Jones, 2 Russ. & M. 376; Campbell *v.* Ingilby, 21 Beav. 567; 25 L. J. Eq. 760. For summary of the English chancery doctrine, see Peachey Mar. Settl. 37.

[3] Peachey Mar. Settl. 53, 54; *ib.* 29–43, and cases cited *passim; In re* Waring, 21 L. J. Eq. 784; Simson *v.* Jones, 2 Russ. & M. 365; Borton *v.* Borton, 16 Sim. 552; Field *v.* Moore, 25 L. J. Eq. 69; 25 E. L. & Eq. 498.

[4] 18 & 19 Vict. c. 43. See Peachey Mar. Settl. 45. For construction of this statute, see *In re* Dalton, 39 E. L. & Eq. 145; s. c. 6 De G. M. & G. 201. But see *Re* Catherine Strong, 2 Jur. N. S. 1241; 5 W. R. 107. Such infant may consent to a proposed reinvestment. *In re* Cardress, L. R. 7 Ch. D. 728. Or exercise during minority a power which was apparently so intended in trust settlement. *Ib.*; Andrews *v.* Andrews, 15 Ch. D. 228.

objection but its mere equitable quality.[1] And in 1843, that a female infant was not bound by agreement to settle her real estate upon marriage.[2] So, in Maryland, a female infant cannot bind her real estate by her marriage settlement.[3]

An objection to the validity of a marriage settlement, on the ground that the parties to it were infants, can only be made by the parties themselves. A trustee acting under it has no such power.[4] But since privies in blood can avoid an infant's voidable conveyance, it is held that if the infant dies after making a settlement of real estate, and without having attained majority, her privies in blood may avoid the settlement.[5] There are circumstances under which the infant's confirmation in part of a settlement will be taken as proof of an intention to confirm the whole of it.[6]

Marriage articles are not of themselves binding upon the infant or her privies; but they are binding upon the adult husband.[7] Yet if the infant dies under age, her privies cannot take the benefits of the proposed settlement and of the inheritance likewise; they may have the more beneficial, and that is all.[8]

CHAPTER II.

ACTS VOID AND VOIDABLE.

§ 400. **General Principle of Binding Acts and Contracts, as to Infants.** — One leading principle runs through all cases which relate to infants. It is that such persons are favorites of the

[1] M'Cartee *v.* Teller, 2 Paige, 511.

[2] Temple *v.* Hawley, 2 Sandf. Ch. 153.

[3] Levering *v.* Levering, 3 Md. Ch. 365. See Burr *v.* Wilson, 18 Tex. 367.

[4] Jones *v.* Butler, 30 Barb. 641.

[5] Levering *v.* Levering, 3 Md. Ch. 365; Whitingham's Case, 8 Rep. 42; Macphers. Inf. 465; Brown *v.* Brown, L. R. 2 Eq. 481.

[6] Davies *v.* Davies, L. R. 9 Eq. 468. As to settling a small fund to the separate use of a chancery ward who marries the day after she comes of age, see White *v.* Herrick, L. R. 4 Ch. 345. As to confirmation, see White *v.* Cox, 2 Ch. D. 387.

[7] Brown *v.* Brown, L. R. 2 Eq. 481; Whichcote *v.* Lyle's Ex'rs, 28 Penn. St. 73.

[8] Brown *v.* Brown, *ib.*

law, which extends its protection over them so as to preserve their true interests against their own improvidence, if need be, or the sinister designs of others. This principle is found constantly in chancery practice. We have traced it already in cases of custody, control, and guardianship, — particularly in such as come before the American courts. It appears again in matters of legal emancipation and the minor's right to his own wages. It generally determines the result of transactions between an infant and his parent or guardian, where fraud and undue influence are suspected. It is applied when a guardian presents his accounts for allowance. We are now to see this same principle at work in the general contracts of infants, controlling and regulating them in great measure, and serving better than any other to explain the shifting and contradictory decisions of the English and American courts on this vexed subject.

Infancy is a personal privilege, allowed for protection against imposition. The general rule of the present day is that an infant shall be bound by no act which is not beneficial to him.[1] And most contracts of infants are divided into the two classes of void and voidable ; a third class — namely, of binding contracts — still remaining for separate consideration in our next chapter.

§ 401. **The Test as to Void and Voidable; Infant's Transactions.** — There is much confusion in the older books on the subject of void and voidable acts and contracts.[2] The keenness with which such a distinction must always cut is an objection to its practical use at the present day ; yet writers have sought to adapt the weapon to the infant's wants. They have searched for some infallible test between void and voidable. Thus Mr. Bingham, after a review of the English cases, years ago, concluded that the only safe criterion was, that "acts which are capable of being legally ratified are voidable only; and acts which are incapable of being legally ratified are absolutely void." [3] But this was only to shift the uncertainty,

[1] Smith Contr. 225; Met. Contr. 38, 39; 2 Kent Com. 234.

[2] See Shep. Touch. 232; Bac. Abr. Infancy and Age (I.), and cases cited in Zouch *v.* Parsons, 3 Burr. 1794.

[3] Bing. Inf. 234.

and replace one difficulty by another. What acts can be legally ratified and what cannot? As Kent properly observes, such a criterion does not appear to free the question from its embarrassment or afford a clear and definite test.[1] Again, a Massachusetts judge of repute declared, many years ago, that the books agree in one result; that whenever the act done *may be* for the infant's benefit it shall not be considered void, but he shall have his election, when he comes of age, to affirm or avoid it; and this, he adds, is the only clear and definite proposition which can be extracted from the authorities.[2] Even this rule, though much better, is found difficult of application, and has been pronounced unsatisfactory in some of the later cases.[3] Besides, it is lacking in comprehensiveness and scope. A more precise and intelligible test than either was that applied in one of the earlier English cases by Chief Justice Eyre, and cited since with approval by Judge Story and Chancellor Kent:[4] namely, that where the court can pronounce that the contract is for the benefit of the infant, as, for instance, for necessaries, then it shall bind him; where it can pronounce it to be to his prejudice, it is void; and that where it is of an uncertain nature, as to benefit or prejudice, it is voidable only, and it is in the election of the infant to affirm it or not.[5] The doctrine seems hardly capable of a closer analysis; yet even this statement of the legal test is by no means clear and conclusive.

The equitable doctrine differs not from the legal as to the contracts of infants. In general, when a contract is not manifestly for the benefit of an infant, he may avoid it, as

[1] 2 Kent Com. 234.

[2] Per Parker, C. J., Whitney *v.* Dutch, 14 Mass. 457. See 2 Kent Com. 234; Met. Contr. 39.

[3] Met. Contr. 40; 1 Am. Lead. Cas. 4th ed. 242.

[4] See United States *v.* Bainbridge, 1 Mason, 82; 2 Kent Com. 236; McGan *v.* Marshall, 7 Humph. 121.

[5] Keane *v.* Boycott, 2 H. Bl. 511. The rule is that contracts of an infant, caused by his necessities or manifestly for his advantage, are valid and binding, while those manifestly for his hurt are void. Contracts falling between these classes are voidable. Philpot *v.* Bingham, 55 Ala. 435. Parke, B., in Williams *v.* Moor, 11 M. & W. 256, 264, alludes to the uncertain sense of the word "void." The word "void" may mean incapable of being enforced; and the plea of infancy is a bar to any demand on one contract as well as the other. But "void" may mean, too, incapable of being ratified.

well in equity as at law; and when it can never be for his benefit, it is utterly void. Infants are favored in all things which are for their benefit, and are saved from being prejudiced by anything to their disadvantage. For infants are by law generally treated as having no capacity to bind themselves, from the want of sufficient reason and discernment of understanding. In regard to their acts, some are voidable and some are void; so in regard to their contracts, some are voidable and some are void.[1] The liberality and freedom exercised in common-law courts at the present day, in shaping general doctrines with reference to infants and their contracts, must be ascribed in a large degree to the influence of the equity tribunals and their decisions. "In short," as Judge Story observes, "the disabilities of an infant are intended by law for his own protection, and not for the protection of the rights of third persons; and his acts may therefore, in many cases, be binding upon him, although the persons, under whose guardianship, natural or positive, he then is, do not assent to them."[2] Where the contract is voidable, not void, the infant has his election to avoid it either during his minority or within a reasonable time after he attains majority; otherwise, it is taken to have been confirmed, and so binds him forever.

§ 402. **Privilege of avoiding is Personal to Infant; Rule as to Third Persons, &c.** — The privilege of avoiding his acts or contracts, where these are voidable, is a privilege personal to the infant, which no one can exercise for him, except his heirs and legal representatives.[3] Hence, the other contracting party remains bound, though the infant be not; for being an indulgence which the law allows infants, to secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security.[4] And were it otherwise, this privilege,

[1] 1 Story Eq. Juris. §§ 240, 241; 1 Fonbl. Eq. b. 1, ch. 2, § 4. And see Turpin *v.* Turpin, 16 Ohio St. 270.

[2] United States *v.* Bainbridge, 1 Mason, 83.

[3] *Ib.*; Keane *v.* Boycott, 2 H. Bl. 511; Met. Contr. 38; Smith Contr. 231.

[4] Bac. Abr. Inf. I. 4; 1 Pars. Contr. 275; Johnson *v.* Rockwell, 12 Ind. 76;

instead of being an advantage to the infant, would in many cases turn out greatly to his detriment.

Thus, where a person of full age promises to marry a minor and afterwards breaks off the match, he may be sued by the minor upon this contract; though he would have had no corresponding remedy against the minor for breach of promise.[1] So a third person, not a party to the contract, cannot take advantage of the infancy of the parties. Thus, in an action for seducing a servant from his master's service, the defendant cannot justify on the ground that the servant was an infant, and therefore not by law bound to perform his contract for service made with the master.[2] On the same principle (connected with others), the acceptor of a bill of exchange, or the maker of a promissory note, cannot resist payment in a suit by an indorsee, though the indorser be an infant.[3] Nor can the purchaser at a sale under an execution set up infancy to defeat prior transactions of the judgment debtor.[4] Nor can the vendor avoid the infant's purchase on such a ground.[5] Nor is a stranger permitted to impeach the conveyance of an infant.[6] So, too, it is the settled doctrine that infancy does not protect the indorsers or sureties of an infant; or those who have jointly entered into his voidable undertakings. They, if of full age, may be held liable, though the infant himself should escape responsibility.[7] Furthermore, the co-

Hartness *v.* Thompson, 5 Johns. 160; Brown *v.* Caldwell, 10 S. & R. 114.

[1] Holt *v.* Ward, 2 Stra. 937; Harvey *v.* Ashley, 3 Atk. 610; Hunt *v.* Peake, 5 Cow. 475; Willard *v.* Stone, 7 Cow. 22; Warwick *v.* Cooper, 5 Sneed, 659; Cannon *v.* Alsbury, 1 Marsh. 78; Rush *v.* Wick, 31 Ohio St. 521.

[2] Keane *v.* Boycott, 2 H. Bl. 511.

[3] Met. Contr. 39; Taylor *v.* Croker, 4 Esp. 187; Nightingale *v.* Withington, 15 Mass. 273; Hardy *v.* Waters, 38 Me. 450; Frazier *v.* Massey, 14 Ind. 382.

[4] Alsworth *v.* Cordtz, 31 Miss. 32.

[5] Oliver *v.* Houdlet, 13 Mass. 237. A sale to an infant is a valid transfer of the property out of the vendor, even though the infant be not bound afterwards to pay the stipulated price. Crymes *v.* Day, 1 Bail. 320. Where a minor agrees, as the consideration of the conveyance of land, to pay certain debts of the grantor, and afterwards does in fact pay them, it is held that the agreement constitutes a valuable consideration for such conveyance, and will support it against the grantor's creditors. Washband *v.* Washband, 27 Conn. 424.

[6] Dominick *v.* Michael, 4 Sandf. 374.

[7] Motteaux *v.* St. Aubin, 2 Black, 1133; Jaffray *v.* Fretain, 5 Esp. 47; Hartness *v.* Thompson, 5 Johns. 160; Parker *v.* Baker, 1 Clarke Ch. (N. Y.) 136; Taylor *v.* Dansby, 42 Mich. 82.

partners of an infant cannot use his right of avoidance for their own benefit.[1]

But third persons should be allowed to protect themselves against undue liabilities on an infant's behalf. Thus, an officer selling property at public auction is not bound to accept the bid of an infant.[2] And although infancy is a personal privilege, yet the administrator of the estate of an infant may avail himself of the infancy of his intestate, to avoid or uphold a transaction to which the latter was a party during his life, and which remained voidable at his death.[3] And as a rule the right of avoidance, with due limitations of time and circumstances, passes to privies in blood entitled to the estate.[4]

§ 403. **Modern Tendency regards Infant's Acts and Contracts as Voidable rather than Void; Instances discussed.** — The strong tendency of the modern cases is to regard all contracts and acts of infants as voidable only; and thus almost to obliterate the ancient distinction of void and voidable contracts altogether.[5] And the *dicta* are of frequent occurrence at the present day that deeds and contracts of an infant are not absolutely void, but voidable only, unless manifestly to the infant's prejudice; and that beneficial contracts are voidable only at most.[6]

Yet there are cases where a contract may still be pronounced absolutely void. In *Regina* v. *Lord*, an English case, the question arose on the conviction of a servant for unlawfully absenting himself from his master's employment.

[1] Brown *v.* Hartford Ins. Co., 117 Mass. 479; Winchester *v.* Thayer, 129 Mass. 129.

[2] Kinney *v.* Showdy, 1 Hill, 544.

[3] Counts *v.* Bates, Harp. 464; Parsons *v.* Hill, 8 Mo. 135; Turpin *v.* Turpin, 16 Ohio St. 270.

[4] Dominick *v.* Michael, 4 Sandf. 374; Beeler *v.* Bullett, 3 A. K. Marsh. 281; Nelson *v.* Eaton, 1 Redf. (N. Y. Sur.) 498; Jefford *v.* Ringgold, 6 Ala. 544; Illinois Land Co. *v.* Bonner, 75 Ill. 315. And see Nolte *v.* Libbert, 34 Ind. 163. The principle of the text applies to marriage articles. See *supra*, § 399. Devisees under a will, as strangers privy in estate only, cannot avoid the infant's contract. Bozeman *v.* Browning, 31 Ark. 364.

[5] See Met. Contr. 40; Shaw, C. J., in Reed *v.* Batchelder, 1 Met. 559.

[6] See Ridgely *v.* Crandall, 4 Md. 435; N. H. M. Fire Ins. Co. *v.* Noyes, 32 N. H. 345; Jenkins *v.* Jenkins, 12 Iowa, 195; Scott *v.* Buchanan, 11 Humph. 468; Babcock *v.* Doe, 8 Ind. 110; Irvine *v.* Irvine, 9 Wall. 617; Robinson *v.* Weeks, 56 Me. 102.

Denman, C. J., in delivering the judgment of the court, observed: "Among many objections, one appears to us clearly fatal. He was an infant at the time of entering into the agreement which authorizes the master to stop his wages when the steam-engine is stopped working for any cause. An agreement to serve for wages may be for the infant's benefit; but an agreement which compels him to serve at all times during the term, but leaves the master free to stop his work and his wages whenever he chooses to do so, cannot be considered as beneficial to the servant. It is inequitable and wholly void." [1]

§ 404. **Same Subject; Bonds, Notes, &c.** — So an infant's bond with penalty and for the payment of interest is held to be void on the ground that it cannot possibly be for his benefit.[2] And a bond executed by a minor as surety is void.[3] So is a mortgage of a minor's property to secure her husband's debt.[4] The infant's promissory note as surety is void.[5] And so is said to be a release by a minor to his guardian, which affords the latter more protection than a receipt.[6] But in Vermont it was decided that there is no general rule exempting an infant from paying interest as necessarily injurious to him.[7] An infant's release of his legacy or distributive share is held to be void in Tennessee.[8] In such cases, an infant is called upon to become the party to some undertaking substantially for the benefit of another, and not for his own profit. The construction of a local statute will in some cases determine that an instrument is void, not voidable.[9] And an

[1] *Quære* whether, notwithstanding the *dictum* of Denman, C. J., in the text, more was properly meant than that this contract was voidable by the infant. The fact that it was voidable, and therefore avoided by the infant, was enough for the purposes of the decision. Regina *v.* Lord, 12 Q. B. 757. Cf. Leslie *v.* Fitzpatrick, 3 Q. B. D. 229.

[2] Baylis *v.* Dineley, 3 M. & S. 477; Fisher *v.* Mowbray, 8 East, 330.

[3] Allen *v.* Minor, 2 Call, 70; Met. Contr. 40; Carnahan *v.* Allderdice, 4 Harring. 99.

[4] Chandler *v.* McKinney, 6 Mich. 217; Cronise *v.* Clark, 4 Md. Ch. 403. See Colcock *v.* Ferguson, 3 Desaus. 482.

[5] Maples *v.* Wightman, 4 Conn. 376; Curtin *v.* Patton, 11 S. & R. 305; Nightingale *v.* Withington, 15 Mass. 272.

[6] Fridge *v.* State, 3 Gill & Johns. 115.

[7] Bradley *v.* Pratt, 23 Vt. 378.

[8] Langford *v.* Frey, 8 Humph 443.

[9] Hoyt *v.* Swar, 53 Ill. 134.

assignment by the infant in trust for the benefit of creditors is held in New York void and not voidable.[1]

Now it is admitted that the decisions are frequently contradictory and uncertain; yet these cases of void contracts almost invariably proceed upon the doctrine that the infant's act was prejudicial to his interest; and certainly if any contract can be so pronounced on mere inspection, it is a contract whereby an infant becomes bound upon another's debt. The technical form of the transaction is of less importance. There are many cases where an infant's bonds, mortgages, and promissory notes have been held not void, but under the circumstances of the case voidable only, as where given in ordinary transactions which may possibly prove beneficial with relation to the minor's property.[2] And reference to the latter cases will show that the modern rule is broadly announced in many States, that an infant's promissory note, his statutory recognizance, and his mortgage, whether of real estate or chattels, are all voidable, rather than void in general.[3] Even an infant's contract as surety or indorser has lately been pronounced voidable and not void in numerous instances.[4] This we conceive to be the reasonable view of the subject; the rule of voidable, rather than void, applying wherever the transaction was not from its very nature such as could be pronounced prejudicial to the infant's interest.

§ 405. **Same Subject; Deeds, &c. Rule of Zouch v. Parsons.** — It is true, however, that the decisions are not invariably

[1] Yates *v.* Lyon, 61 Barb. 205.

[2] State *v.* Plaisted, 43 N. H. 413; Richardson *v.* Boright, 9 Vt. 368; Palmer *v.* Miller, 25 Barb. 399; Reed *v.* Batchelder, 1 Met. 559; Patchkin *v.* Cromack, 13 Vt. 330; Conroe *v.* Birdsall, 1 Johns. Cas. 127; Everson *v.* Carpenter, 17 Wend. 419; Monumental, &c., Association *v.* Herman, 33 Md. 128; Dubose *v.* Wheddon, 4 M'Cord, 221; Little *v.* Duncan, 9 Rich. 55. See Adams *v.* Ross, 1 Vroom (N. J.), 505; Kempson *v.* Ashall, L. R. 10 Ch. 15; Garin *v.* Burton, 8 Ind. 69. But see M'Minn *v.* Richmond, 6 Yerg. 9; Beeler *v.* Young, 1 Bibb, 519.

[3] See *e. g.* Goodsell *v.* Myers, 3 Wend. 479; Reed *v.* Batchelder, 1 Met. 559; Patchkin *v.* Cromack, 13 Vt. 330; State *v.* Plaisted, 43 N. H. 413, and cases cited; Palmer *v.* Miller, 25 Barb. 399; Mustard *v.* Wohlford, 15 Gratt. 329. Whether infant's own statutory recognizance in a criminal proceeding may not be more than voidable, *i. e.* binding, see next c.; State *v.* Weatherwax, 12 Kan. 463.

[4] Owen *v.* Long, 112 Mass. 403; Hardy *v.* Waters, 38 Me. 450; Harner *v.* Dipple, 31 Ohio St. 72; Fetrow *v.* Wiseman, 40 Ind. 148; Williams *v.* Harrison, 11 S. C. 412.

placed by the court upon this ground. The rule of Perkins, which was adopted by the Court of King's Bench in the celebrated case of *Zouch* v. *Parsons*, is that all deeds of an infant which do not take effect by delivery of his hand are merely void, and all such as do take effect by delivery of his hand are voidable. In the one case an interest is conveyed, in another a mere power.[1] This case has come down as authority for all future times; and the rule has frequently been cited with approval, in support of mortgages, bonds, and deeds; but we question the propriety of its modern application as a principle, however useful in describing an incident. So manual delivery, it was said, must accompany the sale of an infant's personal property to render it valid.[2] The real reason of such a rule might have been that solemn instruments and transactions of grave importance ought not to be lightly entered upon; but it is clear that ere the present day much of the ancient veneration for parchment deeds under seal has disappeared, while the tendency is to place real and personal estate transactions on much the same footing, distinguishing rather by the value than the nature of the property. We admit, however, that the common law draws a strong line of demarcation between real and personal property; so that title transfer of the former kind requires far more positive formality than that of the latter.

Now to continue. It is held that an infant may make a voidable purchase of land; for, says Lord Coke, striking the legal principle with wonderful clearness for that day, "*it is intended for his benefit*, and at his full age he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase."[3] For this reason, rather than the technical one just referred to, it may be said in general that the conveyance of land by a minor is also voidable and not void;[4] though here again the courts have

[1] Perkins, § 12; Zouch *v.* Parsons, 3 Burr. 1804; Bool *v.* Mix, 17 Wend. 131; 2 Kent Com. 236, 237, *n.*; State *v.* Plaisted, 43 N. H. 413; Conroe *v.* Birdsall, 1 Johns. Cas. 127.

[2] Fonda *v.* Van Horne, 15 Wend. 631.

[3] Co. Litt. 2 *b*; Met. Contr. 40; Bac. Abr. Inf. 6; Ferguson *v.* Bell, 17 Mo. 347. And see Spencer *v.* Carr, 45 N. Y. 406.

[4] Kendall *v.* Lawrence, 22 Pick. 540; Gillet *v.* Stanley, 1 Hill, 121; Bool *v.*

been prone to cite the rule of Perkins. But the decided cases usually presume that a valuable consideration has passed to the infant, or at least that there is nothing *prima facie* prejudicial to him. Lord Chancellor Sugden, in 1842, in *Allen* v. *Allen*, took occasion to review Lord Mansfield's decision in *Zouch* v. *Parsons*, and commended it as sound law in respect that a deed which takes effect by delivery, and is executed by an infant, is voidable only; though he intimated that his own decision might equally well be referred to the benefit arising to the infant from the deed; which, indeed, was one of the grounds on which Lord Mansfield had decided that celebrated case.[1] An infant's conveyance of land by way of gift or without consideration is held to be void, because obviously prejudicial to his interests.[2]

So leases to infants are not absolutely void; but voidable only.[3] And an exchange of property made by an infant is voidable.[4] And it is held that the infant's bond for title to real estate is voidable and not void.[5]

§ 406. **Same Subject; Letters of Attorney; Cognovits, &c.** — So a power of attorney to authorize another to receive seisin of land for an infant, in order to complete his title to an estate conveyed to him by feoffment, is voidable only; it being an authority to do an act for his probable benefit.[6]

But letters of attorney from an infant conveying no present interest are held to be absolutely null. This point was discussed in *Zouch* v. *Parsons*, and on the distinction of Perkins's rule, it was maintained that writings "which take

Mix, 17 Wend. 119; Wheaton *v.* East, 5 Yerg. 41; Phillips *v.* Green, 5 Monr. 344; Eagle Fire Ins. Co. *v.* Lent, 6 Paige, 635; Allen *v.* Poole, 54 Miss. 323; Illinois Land Co. *v.* Bonner, 75 Ill. 315; Dixon *v.* Merritt, 21 Minn. 196; Davis *v.* Dudley, 70 Me. 236; Weaver *v.* Carpenter, 42 Iowa, 343; Schaffer *v.* Lavretta, 57 Ala. 14. And so as to infant wife. Scranton *v.* Stewart, 52 Ind. 68. Or infant husband. Barker *v.* Wilson, 4 Heisk. 268; Yourse *v.* Norcross, 12 Mo. 549.

[1] Allen *v.* Allen, 3 Dru. & War. 340. See Co. Litt. 51 *b*, *n.* by Hargrave.

[2] Swafford *v.* Ferguson, 3 Lea, 292. Cf. Slaughter *v.* Cunningham, 24 Ala. 260.

[3] Zouch *v.* Parsons, 3 Burr, 1806; Hudson *v.* Jones, 3 Mod. 310; Taylor Landlord & Tenant, and cases cited; Griffith *v.* Schwenderman, 27 Mo. 412.

[4] Co. Litt. 51 *b*; Williams *v.* Brown, 34 Me. 594.

[5] Weaver *v.* Jones, 24 Ala. 420.

[6] Met. Contr. 41; 1 Roll. Abr. 730; Zouch *v.* Parsons, *supra*.

effect" cannot include letters of attorney, or deeds which delegate a mere power and convey no interest. Whatever might be thought of this explanation the conclusion follows: "that powers of attorney are an exception to the general rule, that the deeds of infants are only voidable; and a power to receive seisin is an exception to that. The end of the privilege is to protect infants; and to that object all the rules and their exceptions must be directed."[1] And the English courts have uniformly held the infant's warrant of attorney void, even though executed jointly with others.[2] In this country, there are decisions in some States to the same effect;[3] in others, again, the rule is deemed somewhat doubtful.[4]

An infant's power of attorney to another to sell his lands is deemed so manifestly unbeneficial on the face of it as to be void, and a sale made under such a power does not confer even an inchoate title.[5] But a power of attorney from an infant to sell a note is lately held voidable, not void, in California.[6] In Massachusetts, an instrument of assignment, not under seal, which appoints the assignee attorney to receive the fund to his own use, is not void.[7] And in Maine the act of an infant in transferring a negotiable note, though his name be written by another under parol authority, is voidable only.[8] The good sense of the rule seems to be, as a recent writer observes, that an authority delegated by an infant for a purpose which may be beneficial to him, or which the court cannot pronounce to be to his prejudice, should be considered as rendering the contract made, or act done by virtue of it,

[1] Per Lord Mansfield, in Zouch *v.* Parsons, 3 Burr. 1804. And see Cummings *v.* Powell, 8 Tex. 88.

[2] Saunderson *v.* Marr, 1 H. Bl. 75; Ashlin *v.* Langton, 4 Moore & S. 719, and cases cited.

[3] Lawrence *v.* M'Arter, 10 Ohio, 37; Waples *v.* Hastings, 3 Harring. 403; Bennett *v.* Davis, 6 Cow. 393; Semple *v.* Morrison, 7 Monr. 298; Pyle *v.* Cravens, 4 Litt. 17; Knox *v.* Flack, 22 Penn. St. 337.

[4] Pickler *v.* State, 18 Ind. 266. But see Trueblood *v.* Trueblood, 8 Ind. 195. See Whitney *v.* Dutch, 14 Mass. 457; Met. Contr. 41; Cummings *v.* Powell, 8 Tex. 88; 1 Am. Lead. Cas. 4th ed. 242 *et seq.*

[5] Philpot *v.* Bingham, 55 Ala. 435. Cf. Weaver *v.* Carpenter, 42 Iowa, 343; Armitage *v.* Widoe, 36 Mich. 124.

[6] Hastings *v.* Dollarhide, 24 Cal. 195.

[7] McCarty *v.* Murray, 3 Gray, 578. And see Kingman *v.* Perkins, 105 Mass. 111.

[8] Hardy *v.* Waters, 38 Me. 450.

as voidable only, in the same manner as his personal acts and contracts are considered.[1] And, we may add, the English and most of the American decisions do not seem to carry the rule beyond cases of the technical "warrant of attorney" to appear in court and bind the infant, as in confessing judgment, except it be with reference to an infant's land, which power stands upon a strong footing of objection. What we call "powers of attorney" are less likely than the warrant of attorney to be to the infant's prejudice; though we may well assume that whatever an infant cannot do he cannot authorize another to do for him, so as to make the transaction more binding.

An infant cannot bind himself by cognovit. "We come to this conclusion," said Lord Abinger, "on three grounds, each of which is fatal to the validity of the cognovit. First, it is bad because it falls within the principle which prevents an infant from appointing and appearing in court by attorney; he can appear by guardian only. Secondly, by this means the minor is made to state an account, which the law will not allow him to do, so as to bind himself; if an action be brought against him, the jury are to determine the reasonableness of the demand made. Thirdly, the general principle of law is, that a minor is not to be allowed to do anything to prejudice himself or his rights.[2]"

§ 407. **Same Subject; Miscellaneous Acts and Contracts Voidable and not Void.** — An infant may in some States avoid his usurious contracts, and recover the money so lent under the count for money had and received.[3] But the policy of usury is becoming abandoned in many parts of the country.

An infant may avoid his release of damages for an injury or an award upon a submission entered into by him. But if, upon trial, the jury shall find such damages to have been satisfied by an adequate compensation, the infant shall recover nominal damages only.[4] The rule is general that an infant

[1] Met. Contr. 42. And see Powell *v.* Gott, 13 Mo. 458.

[2] Oliver *v.* Woodroffe, 4 M. & W. 653 (1839). But the second of these grounds is not now tenable. See Williams *v.* Moor, 11 M. & W. 256.

[3] Millard *v.* Hewlett, 19 Wend. 301.

[4] Baker *v.* Lovett, 6 Mass. 78.

is not bound by his agreement to refer a dispute to arbitration; nor by an award, even in his own favor; though this is usually voidable only.[1]

Among the acts of the infants which are in the later cases regarded as voidable and not void are the following: His appeal from a justice's decision.[2] Judgments against him.[3] His covenant to carry and deliver money.[4] His chattel mortgage.[5] His agreement to convey.[6] And, in short, deeds and instruments under seal, with perhaps the exception of powers of attorney; though it is otherwise, perhaps, if the instrument should manifestly appear on the face of it to be fraudulent or otherwise to the prejudice of the infant; "and this," says Judge Story, "upon the nature and solemnity, as well as the operation of the instrument."[7] In Massachusetts, a contract of charter to an infant, though by parol, is voidable and not void.[8] So, too, an infant's promise to pay money borrowed on joint account with another.[9] And, in various instances a family arrangement as to settlement of an estate in which the minor is interested.[10] In so many cases of the character discussed in this chapter the infant at the proper time is presented as seeking and being permitted to set aside the transaction, that the voidable rather than void nature of the transaction is assumed, and the decision is more to the point that, void or voidable, it does not under the circumstances bind him.

It has been repeatedly decided in England that where an infant becomes the holder of shares by his own contract and

[1] Watson on Awards, ch. 3, § 1; Smith Contr. 280; Britton *v.* Williams, 6 Munf. 453; Barnaby *v.* Barnaby, 1 Pick. 221. See Guardian and Ward, *supra*.

[2] Robbins *v.* Cutler, 6 Fost. 173.

[3] Trapnall *v.* State Bank, 18 Ark. 53; Kemp *v.* Cook, 18 Md. 130; Bickel *v.* Erskine, 43 Iowa, 213; Wheeler *v.* Ahrenbeak, 54 Tex. 535; Walkenhorst *v.* Lewis, 24 Kan. 420. See c. 6, *post*.

[4] West *v.* Penny, 16 Ala. 186.

[5] Miller *v.* Smith, 26 Minn. 248; Corey *v.* Burton, 32 Mich. 30.

[6] Carrell *v.* Potter, 23 Mich. 377.

[7] Per Story, J., Tucker *v.* Moreland, 10 Pet. 71; 2 Kent Com. 236, 11th ed., *n.*, and cases cited. And see Regina *v.* Lord, 12 Q. B. 757.

[8] Thompson *v.* Hamilton, 12 Pick. 425.

[9] Kennedy *v.* Doyle, 10 Allen, 161. So, too, a purported gift to an infant of a contract of purchase involving pecuniary obligation. Armitage *v.* Widoe, 36 Mich. 124.

[10] Turpin *v.* Turpin, 16 Ohio St. 270; Jones *v.* Jones, 46 Iowa, 466.

subscription he is *prima facie* liable to pay calls or assessments; but he may repudiate that contract and subscription; and if he does so while an infant, although he may on arriving at full age affirm his repudiation, or receive the profits, it is for those who insist on this liability to make out the facts.[1] A minor's contract for stock is doubtless voidable in this country.[2]

An absolute gift of articles of personal property made by an infant can be revoked or avoided by him.[3] And the executed contract of an infant follows the same rule as an executory one; he may rescind the one as well as the other; the more so, where the other party can be put substantially *in statu quo*.[4] But if before rescission the adult make a *bona fide* sale of property purchased of the minor, trover will not lie against him.[5] And it is held, on the ground of an executed agency, that money belonging to an infant soldier and received from him by his brother, with authority to use it for the support of their needy parents, and so used by the brother, cannot be recovered by the infant upon reaching majority.[6] But, in general, an infant soldier's gift of his bounty and pay, even to his own father, is treated as voidable and revocable.[7]

§ 408. **Infant's Trading and Partnership Contracts.** — The rule is a general one that an infant cannot trade, and consequently cannot bind himself by any contract having relation to trade. "We know, by constant experience," says Mr. Smith, "that infants do, in fact, trade, and trade sometimes very extensively. However, there exists a conclusive presumption of law that no infant under the age of twenty-one has discretion enough for that purpose."[8] In *Dilk* v. *Keigh-*

[1] Smith Contr. 285; Newry & Enniskillen R. R. Co. *v.* Coombe, 3 Exch. 565; London & Northwestern R. R. Co. *v.* M'Michael, 5 Exch. 114. See, as to the liability of a stock-jobber in such cases, Brown *v.* Black, L. R. 8 Ch. 939; Merry *v.* Nickalls, L. R. 7 Ch. 733.

[2] Indianapolis Chair Co. *v.* Wilcox, 59 Ind. 129; 97 Penn. St. 202.

[3] Person *v.* Chase, 37 Vt. 647; Oxley *v.* Tryon, 25 Iowa, 95. So, too, his deed of gift to a trustee. Slaughter *v.* Cunningham, 24 Ala. 260.

[4] Hill *v.* Anderson, 5 S. & M. 216; Robinson *v.* Weeks, 56 Me. 102.

[5] Carr *v.* Clough, 6 Fost. 280; Riley *v.* Mallory, 33 Conn. 201.

[6] Welch *v.* Welch, 103 Mass. 562.

[7] Holt *v.* Holt, 59 Me. 464; *supra*, § 252.

[8] Smith Contr. 278. See Whywall *v.* Champion, 2 Stra. 1083; Dilk *v.* Keighley, 2 Esp. 480.

ley, the infant was a glazier, and the person who sued him sought to make out that the goods furnished were in the nature of necessaries, to enable the infant to earn a livelihood; but this plea did not avail.[1] And an infant, rescinding a trading contract with another, was allowed to recover back, in an action for money had and received, a sum which he had paid towards the purchase of a share in the defendant's trade, if without consideration and he had actually derived no benefit or profit from the business.[2] So, too, as an infant cannot trade, he cannot become a bankrupt, and a fiat against him is void.[3]

Yet, even in trading contracts it must not be forgotten that the current of modern decisions is to make the transactions of an infant voidable and not void. The English case of *Goode* v. *Harrison* is exactly in point; where a person was held liable for goods supplied him as one of a partnership, on the ground that the contract was voidable, not void, and that when the infant became of age he had substantially ratified his former act. "It is clear," says Justice Bayley, "that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy; but still he may be a partner. If he is, in point of fact, a partner during his infancy, he may, when he comes of age, elect whether he will continue that partnership or not. If he continue the partnership he will then be liable as a partner."[4] Nor is another principle to be lost sight of in trading contracts; namely, that fraudulent representations and acts, though made by an infant, may sometimes make his contract binding upon him, or at least afford a means of holding him answerable for the transaction; but of this hereafter.

In this country, it is likewise admitted that, in point of fact, infants do sometimes trade;[5] but that, nevertheless, their trading contracts do not absolutely bind them, being

[1] Dilk *v.* Keighley, 2 Esp. 480.

[2] Corpe *v.* Overton, 10 Bing. 252; Holmes *v.* Blogg, 8 Taunt. 508. See next chapter.

[3] Smith Contr. 282, and cases cited; Belton *v.* Hodges, 9 Bing. 365; Rex *v.* Wilson, 5 Q. B. D. 28. And see Winchester *v.* Thayer, 129 Mass. 129.

[4] 5 B. & Ald. 147. See Smith Contr. 283.

[5] Whitney *v.* Dutch, 14 Mass. 457; Houston *v.* Cooper, Penning. 865;

voidable at their option and not absolutely void.[1] An infant's partnership agreement, too, is not void, but voidable.[2] And it is held in Massachusetts, that an infant cannot be compelled to pay for grain furnished for horses owned by a firm of which he was a member, though the horses were employed in the usual business of the firm, and though he was emancipated by his father. But we understand the principle of that decision to accord with the English doctrine; which doctrine does not appear too far extended in South Carolina, where it was once expressly decided that a person's express or implied ratification of the partnership upon reaching majority makes him liable for a debt of the firm contracted during his infancy, although he was ignorant of the existence of the debt at the time of such ratification, and had, on being informed of it, refused to pay for it.[3] For the principle thus indicated is, that to affirm a partnership contract on reaching majority, and continuing to receive its benefits, is to affirm it with its usual inseparable incidents. Certainly, the infant member of a firm should not be permitted to derive undue advantages over his partner.[4]

§ 409. **Void and Voidable Acts contrasted; When may Voidable Acts be affirmed or disaffirmed.** — What, then, is the difference between the void and the voidable contracts of an infant? Simply this: that the void contract is a mere nullity, of which any one can take advantage, and which is, in legal estimation, incapable of being ratified; while a voidable contract becomes at the option of the infant, though not otherwise, binding upon himself and all concerned with him.[5] Acts or circumstances, then, which amount to a legal ratification,

Kitchen *v.* Lee, 11 Paige, 107; Beller *v.* Marchant, 30 Iowa, 350.

[1] Mason *v.* Wright, 13 Met. 306; Kinnen *v.* Maxwell, 66 N. C. 45.

[2] Jaques *v.* Sax, 39 Iowa, 367; Dunton *v.* Brown, 31 Mich. 182. That the minor had an interest in profits, but had not put in capital, does not operate to discharge him from liability. Jaques *v.* Sax, 39 Iowa, 367. See, as to pleadings, Kine *v.* Barbour, 70 Ind. 35.

[3] Miller *v.* Sims, 2 Hill (S. C.), 479.

[4] See Kitchen *v.* Lee, 11 Paige, 107; Dunton *v.* Brown, 31 Mich. 182. But see Minock *v.* Shortridge, 21 Mich. 304, where an infant refused, on majority, after the goods had been disposed of and the partnership closed, to pay the partnership note, though recognizing the partnership in some other respects.

[5] See Met. Contr. 41; Story Eq. Juris. § 241.

serve to make the voidable contract of an infant completely binding and perpetually effectual; and this period of ratification is to be usually referred to the date when the disability of infancy ceases, and he becomes of full age, — though not always. What amounts to a legal ratification, under such circumstances, we shall show in a subsequent chapter. On the other hand, acts or circumstances which at the proper time amount to disaffirmance will render the infant's voidable contract of no effect.

An infant's voidable conveyance of land, which is a solemn instrument, and perhaps his deeds generally, cannot be avoided or confirmed during his minority.[1] But as to many other transactions it is different, particularly where the contract relates to personal property, or is an executory one, to perform services, for instance. And the American cases seem to establish clearly the doctrine that an infant's sale or exchange of personal property, or contract for such sale or exchange, may be rescinded by him at any time during minority; and when the transaction is thus avoided, the title to the property revests in the infant.[2] This distinction appears to be recognized out of regard to the infant's benefit; since land might be recovered after long lapse of time upon disturbing the possessor's title, while personal property would often be utterly lost if one could not trace out and recover it until he became of age. To repudiate one's general contract while yet an infant, so as to gain an unfair advantage, is not usually permitted; but the court requires his decision to be post-

[1] Zouch *v.* Parsons, 3 Burr. 1794; McCormie *v.* Leggett, 8 Jones, 425; Bool *v.* Mix, 17 Wend. 119; Emmons *v.* Murray, 16 N. H. 385; Cummings *v.* Powell, 8 Tex. 80; Sims *v.* Everhardt, 102 U. S. Supr. 300; Phillips *v.* Green, A. K. Marsh. 87; Tillinghast *v.* Holbrook, 7 R. I. 239. So his chattel mortgage cannot be made binding to his prejudice by any act of affirmance during minority. Corey *v.* Burton, 32 Mich. 30.

[2] Grace *v.* Hale, 2 Humph. 27; Shipman *v.* Horton, 17 Conn. 481; Kitchen *v.* Lee, 11 Paige, 107; Willis *v.* Twombly, 13 Mass. 204; Carr *v.* Clough, 6 Fost. 280; Monumental Building Association *v.* Herman, 33 Md. 128; Riley *v.* Mallory, 33 Conn. 201; Briggs *v.* McCabe, 27 Ind. 327. An infant's contract for purchasing stock may be avoided or go unfulfilled during minority. Indianapolis Chair Co. *v.* Wilcox, 59 Ind. 429. So his contract to marry, or to perform labor for a specified time, as seen in chapters 3, 5, *post*.

poned to mature age.[1] An infant's void conveyance he may have set aside at any time during infancy.[2]

CHAPTER III.

ACTS BINDING UPON THE INFANT.

§ 410. **General Principle of Binding Acts and Contracts.**— We have seen that the general contracts of infants are either void or voidable, and that the tendency at this day is to treat them as voidable only. But keeping in view the principle that an infant's beneficial interests are to be judicially protected, we shall find that there are some contracts which he ought to be able for his own good to make; some contracts of which it may be said that the privilege of standing upon a clear footing is worth more to him than the privilege of repudiation. Some such contracts there are, recognized as exceptions to the general rule; these are neither void nor voidable, but are obligatory from the outset, and thus neither require nor admit of ratification on the infant's part.[3]

§ 411. **Contracts for Necessaries; What are such for Infants.** — The most important of this class of contracts are those for necessaries; which in fact are so important that they are often mentioned as the only exception to the rule of void and voidable contracts. The general signification of the word "necessaries" has already been discussed with reference to married women; but it is readily perceived that what are necessaries for a wife may not be equally necessaries for a child, and what are necessaries for young children may not be equally necessaries for those who have nearly reached majority. The leading principles of the doctrine of necessaries being made clear, and a rule of legal classification

[1] Dunton *v.* Brown, 31 Mich. 182.

[2] Swafford *v.* Ferguson, 3 Lea, 292. A statute provision is sometimes found as to disaffirmance during minority. Murphy *v.* Johnson, 45 Iowa, 57.

[3] See Met. Contr. 64; Smith Contr. 268 *et seq.*

judicially announced, any man of ordinary intelligence knows how to apply it; and yet juries will not and cannot always agree in their conclusions on this point, every one having some preconceived notions of his own on topics so constantly occurring in our every-day life, and to so great an extent involving individual tastes and preferences. Plainly, it is wrong to prevent an infant from attaining objects not only not detrimental, but of the utmost advantage, to him; "since," as it has been observed, "otherwise he might be unable to obtain food, clothes, or education, though certain to possess at no very distant period the means of amply paying for them all."[1]

Food, lodging, clothes, medical attendance, and education, to use concise words, constitute the five leading elements in the doctrine of the infant's necessaries. But, to apply a practical legal test, we must construe these five words in a very liberal sense, and somewhat according to the social position, fortune, prospects, age, circumstances, and general situation of the infant himself. "It is well established by the decisions," says one writer, "that under the denomination *necessaries* fall not only the food, clothes, and lodging necessary to the actual support of life, but likewise means of education suitable to the infant's degree; and all those accommodations, conveniences, and even matters of taste, which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves."[2] Says another: "The word *necessaries* is a relative term, and not confined to such things as are positively required for mere personal support."[3] The language of an American judge is this: "It would be difficult to lay down any general rule upon this subject, and to say what would or would not be necessaries. It is a flexible, and not an absolute term."[4]

Articles of mere ornament are not necessaries. The true rule is taken to be that all such articles as are purely orna-

[1] Smith Contr. 269.

[2] *Ib.* 269.

[3] Met. Contr. 69. And see Peters *v.* Fleming, 6 M. & W. 42.

[4] Breed *v.* Judd, 1 Gray, 458, per Thomas, J.

mental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters therefore an infant cannot be made responsible. But if they were not of this description, then the question arises whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved; if they were, for such articles the infant may be made responsible.[1] The result of the cases on both sides of the Atlantic seems to be that unless the articles are, both as to quality and quantity, such as must be necessaries to any one, the burden of proof lies on the plaintiff to show such a condition of life of the defendant as might raise to the rank of necessaries things which would otherwise be considered luxuries.[2]

In England, a pair of solitaires (or shirt fasteners), worth £25, are not, it would appear, necessaries for any infant.[3] But it seems that presents to a bride, when she becomes the defendant's wife, may be necessaries.[4] Betting-books are not an infant's necessaries.[5] Nor tobacco, though for a minor soldier.[6] Nor money paid to relieve an infant from draft for military duty.[7] Horses, saddles, harness, and carriages may be necessaries under some circumstances; but not ordinarily; and this is the better doctrine, English and American.[8] Wedding garments for an infant who marries are, within reasonable limits, necessaries.[9] But not the treats of an undergraduate at college.[10] Nor, in Arkansas, as it appears, kid gloves, cologne, silk cravats, and walking-canes.[11] The

[1] Per Parke, B., Peters *v.* Fleming, 6 M. & W. 42.

[2] Smith Contr. 272, 5th Am. ed., Rawle's *n.*, and cases cited; Harrison *v.* Fane, 1 Man. & Gr. 550; Wharton *v.* Mackenzie, 5 Q. B. 606; Rundel *v.* Keeler, 7 Watts, 239; Bent *v.* Manning, 10 Vt. 225; Merriam *v.* Cunningham, 11 Cush. 40.

[3] Ryder *v.* Wombwell, L. R. 4 Exch. 32.

[4] Genner *v.* Walker, 19 Law Times, N. S. 398; 3 Am. Law Rev. 590.

[5] *Ib.*

[6] Bryant *v.* Richardson, L. R. 3 Ex. 93, *n.*

[7] Dorrell *v.* Hastings, 28 Ind. 478.

[8] Harrison *v.* Fane, 1 Man. & Gr. 550; Grace *v.* Hale, 2 Humph. 67; Aaron *v.* Harley, 6 Rich. 26; Merriam *v.* Cunningham, 11 Cush. 40; Beeler *v.* Young, 1 Bibb, 519; Owens *v.* Walker, 2 Strobh. Eq. 289.

[9] Sams *v.* Stockton, 14 B. Monr. 232.

[10] Wharton *v.* Mackenzie, 5 Q. B. 606; Brooker *v.* Scott, 11 M. & W. 67.

[11] Lefils *v.* Sugg, 15 Ark. 137.

uniform of an officer's servant is adjudged a necessary; but not cockades for his company.[1] An insurance contract is not a necessary.[2] But a solicitor's bill for preparing a marriage settlement may be.[3] Those who incline to pursue the subject still further will find some interesting decisions as to balls, serenades, suits of satin and velvet, and doublets of fustian, among the ancient cases which have survived the fashions they describe.[4]

§ 412. **Contracts for Necessaries; Subject continued.** — It is usual to leave the question of necessaries in each case to the jury, without very positive directions. But the dividing line between court and jury is not in this respect clearly marked, as the latest cases teach us. *Ryder* v. *Wombwell* lays it down that the question whether articles are necessaries is one of fact, but, like other questions of fact, should not be left to the jury unless there is evidence on which they could reasonably find that they were.[5] The immediate object of this decision was to set aside a verdict deemed improper; as to the fitness of such a rule in its broader application there is considerable doubt.[6] But it has frequently been said, that in a very clear case a judge would be warranted in directing a jury authoritatively that some articles, like diamonds and race-horses, would not be necessaries for any minor.[7]

The propriety of classing education as among the necessaries of an infant rests rather upon respectable *dicta* than

[1] Hands *v.* Slaney, 8 T. R. 578; Coates *v.* Wilson, 5 Esp. 52.

[2] New Hampshire Ins. Co. *v.* Noyes, 32 N. H. 345. See Harrison *v.* Fane, 1 Man. & Gr. 550; Davis *v.* Caldwell, 12 Cush. 512; Bent *v.* Manning, 10 Vt. 225; Stanton *v.* Willson, 3 Day, 37; Glover *v.* Ott, 1 M'Cord, 572; Rundel *v.* Keeler, 7 Watts, 239.

[3] Helps *v.* Clayton, 17 C. B. N. S. 553.

[4] See cases cited Met. Contr. 69, 70; Cro. Eliz. 583.

[5] Ryder *v.* Wombwell, L. R. 4 Exch. 32.

[6] Of this rule, says Cockburn, C. J., of the Queen's Bench, still later: "I really cannot understand it, unless it means that it is to be a question of law for the judge to determine whether the articles disputed are, or are not, necessaries. If that is to be taken to be law, of course I must act upon it; but I should certainly have preferred the law as it was previously understood to be, that it was for the jury to say what articles were reasonably necessary with reference to the position of the defendant, the infant." Genner *v.* Walker, 19 Law Times, N. S. 398.

[7] See Harrison *v.* Fane, Davis *v.* Caldwell, and other cases, *supra;* Mohney *v.* Evans, 51 Penn. St. 80.

precedents. Lord Coke includes among necessaries for which an infant may bind himself by contract, "good teaching and instruction, whereby he may profit himself afterwards;" and the doctrine within strict limits is undoubtedly correct.[1] In Vermont it is decided that a collegiate education is not to be ranked among those necessaries for which an infant can render himself absolutely liable.[2] But the court seems to make this but a *prima facie* rule, and to admit that extraneous circumstances might be shown to make even this a necessary; while a good common-school education is strongly pronounced to be such. And the judge adds: "I would not be understood as making any allusion to professional studies, or to the education and training which is requisite to the knowledge and practice of mechanic arts. These partake of the nature of apprenticeships, and stand on peculiar grounds of reason and policy. I speak only of the regular and full course of collegiate study."[3]

An infant is not liable, at common law, for the expense of repairing his dwelling-house on a contract made by him or his guardian or parent for that purpose; although such repairs were necessary for the prevention of immediate and serious injury to the house.[4] So timber furnished to an infant for building on his own land is not a necessary.[5] The law is extremely reluctant to permit an infant's real estate to be encumbered in any possible way.

So it is ruled that the services and expenses of counsel in a suit brought to protect the infant's title to his real estate cannot for similar reasons be charged against the infant on his own contract.[6] But the doctrine that legal expenses cannot be charged as necessaries for an infant appears not to prevail in Connecticut; and the more liberal rule is asserted, that in cases where, under peculiar circumstances, a civil suit is the only means by which an infant can procure the abso-

[1] Co. Litt. 172; 1 Sid. 112; Met. Contr. 69, *n.*; Smith Contr. 269, 273.

[2] Middlebury College *v.* Chandler, 16 Vt. 683.

[3] Per Royce, J., *ib.*

[4] Tupper *v.* Caldwell, 12 Met. 559; West *v.* Gregg, 1 Grant, 53; Wallis *v.* Bardwell, 126 Mass. 366; Price *v.* Sanders, 60 Ind. 310.

[5] Freeman *v.* Bridger, 4 Jones Law, 1.

[6] Phelps *v.* Worcester, 11 N. H. 51.

lute necessaries which he requires, power cannot be denied him to make the necessary contracts for its commencement and prosecution; for it would be a reproach to the law to hold otherwise.[1] In this particular case the circumstances justifying relief were very strong. Moreover, the English cases long ago established that money advanced to an infant to procure him liberation from arrest, where he was in execution or taken in custody on a debt for necessaries, could be recovered as necessaries.[2] Services of an attorney in defending the infant against a criminal complaint may likewise be recovered.[3] And we have already seen that legal expenses may sometimes be classed as necessaries for married women.[4] On the whole, it may be said that legal expenses on behalf of a minor may or may not be regarded as a necessary for him, according to circumstances and the reasonableness of incurring them. And it would appear that the burden of proof is upon an attorney to show that the suit could be viewed in such a light, so as to entitle him to recover for his fees and disbursements.[5] Generally, a guardian or next friend would assume the responsibility of employing counsel for advice or suits on an infant's behalf. A court of equity will enforce against an infant an agreement settling a suit made by his guardian, when it appears to have been made for the infant's benefit.[6]

The doctrine of necessaries is manifestly not to be extended to an infant's trading contracts, as we have already intimated. Thus the board of four horses for six months, the principal use of which was in the business of a hackman, is not within the class of necessaries for which an infant is liable, although the horses are occasionally used to carry his family out to ride.[7] The board of an infant, again, is included among the necessaries for which he may pledge his credit.[8] But

[1] Munson *v.* Washband, 31 Conn. 303.

[2] Clarke *v.* Leslie, 5 Esp. 28; 2 Eden, 72.

[3] Barker *v.* Hibbard, 54 N. H. 539.

[4] *Supra*, p. 93.

[5] Thrall *v.* Wright, 38 Vt. 494.

[6] *In re* Livingston, 34 N. Y. 555. And so where there is no guardian, and the counsel's services contributed to secure the estate to the infant. Epperson *v.* Nugent, 57 Miss. 45.

[7] Merriam *v.* Cunningham, 11 Cush. 40; *supra*, § 408.

[8] Bradley *v.* Pratt, 23 Vt. 378.

here, too, we must keep within our principle. Thus where an infant took a house to carry on the business of a barber; the house containing five rooms, two on the ground floor, one of which he occupied as a shop, the other to reside in, and three above, which he underlet; he was held not to be liable for the rent.[1] An infant may contract for his necessary lodging, but he cannot bind himself for more.

§ 413. **Contracts for Necessaries; Same Subject.** — But the question in all such cases is one of mixed law and fact. And articles *prima facie* to be classed as luxuries, such as wines, fruits, and the use of a horse and carriage, might, under some circumstances, become necessaries; as if, for instance, medically prescribed, for an infant's health; though this salutary rule is not designed to support a quibble.[2] The infant's clothes may be fine or coarse, according to his rank; his education may vary according to the station he is to fill, and the extent of his probable means when of age; and as to servants, attendance, and the like, this will depend on his social position.[3] Stock purchased for a farm, too, may under some special circumstances be treated as necessaries.[4] And upon such issues, quantity may be as much for the consideration of the jury as quality.[5] Primarily, the parent or guardian who supplies the necessaries is the judge of what quantity and quality are suitable for the infant.[6] And if the natural protector with whom the child lives does his legal duty as best he may according to his means, the fact that he is poor, and unable to pay for what was furnished to the child, will not render the child's estate liable.[7]

If one furnish an infant necessaries, and also other articles not necessary under his circumstances and condition, he is not on that account precluded from recovering for the neces-

[1] Lowe *v.* Griffith, 1 Scott, 458.

[2] See Wharton *v.* Mackenzie, 5 Q. B. 606.

[3] See Alderson, B., Chapple *v.* Cooper, 13 M. & W. 258. Gold filling and dentist's work upon his teeth should be classed among the necessaries of a minor of good means and social position. Strong *v.* Foote, 42 Conn. 203.

[4] Mohney *v.* Evans, 51 Penn. St. 80.

[5] Burghart *v.* Angerstein, 6 Car. & P. 690.

[6] Thus, a journey for the child's recreation, without the parent's or guardian's approval, cannot generally be deemed a necessary. McKanna *v.* Merry, 61 Ill. 177.

[7] Hoyt *v.* Casey, 114 Mass. 397.

saries; though, as to to the balance of his claim, he may be without a remedy.[1]

An infant is not liable for necessaries when he lives under the roof of his father, who provides everything which seems proper. And so when he is supplied by a guardian or widowed mother. The parent or the legal protector having the means and being willing to furnish all that is actually necessary, the infant can make no binding contract for any article without such protector's consent. *Prima facie*, where the child resides at home, proper maintenance is furnished him: and the tradesman who furnishes goods to an infant does so at his peril; it is incumbent upon him to show the necessity of a supply.[2] But an infant, when absent from home, and not under the care of his parent or guardian, is usually liable for his own necessaries.[3] And the law will imply a promise, on the part of an infant having no legal protector, to make payment;[4] though not for any fixed amount, but only a reasonable price.[5]

There is no inflexible rule of law, however, which makes it incumbent on the tradesman who supplies an infant to inquire as to his situation and resources before giving him credit for necessaries; though it would be prudent always for him to do so.[6] And the parent or guardian may sanction by words or conduct the child's purchase, so as to make it obligatory. As in a case where the infant daughter, living with her mother at a hotel, drove to the plaintiff's store in a carriage, accompanied by her mother, who waited in the carriage while her daughter purchased the goods, some of which she took home in the

[1] Turberville *v.* Whitehouse, 12 Price, 692; Bent *v.* Manning, 10 Vt. 225. And see Johnson *v.* Lines, 6 W. & S. 80; Wilhelm *v.* Hardman, 13 Md. 140.

[2] Bainbridge *v.* Pickering, 2 Blacks. 1325; Story *v.* Pery, 4 Car. & P. 526; Angel *v.* McLellan, 16 Mass. 28; Wailing *v.* Toll, 9 Johns. 146; Johnson *v.* Lines, 6 W. & S. 80; Kline *v.* L'Amoreux, 2 Paige, 419; Perrin *v.* Wilson, 10 Mo. 451; Freeman *v.* Bridger, 4 Jones Law, 1; Smith *v.* Young, 2 Dev. & Bat. 26; Connolly *v.* Hull, 3 McCord, 6; Elrod *v.* Myers, 2 Head, 33; Kraker *v.* Byrum, 13 Rich. 163; Tilton *v.* Russell, 11 Ala. 497; Hussey *v.* Roundtree, Busbee Law, 110. Perhaps for a return of such necessaries as the minor has not consumed the tradesman may sue. Nichol *v.* Steger, 2 Tenn. 328.

[3] Angel *v.* McLellan, 16 Mass. 28; Hunt *v.* Thompson, 3 Scam. 179.

[4] Hyman *v.* Cain, 3 Jones Law, 111; Epperson *v.* Nugent, 57 Miss. 45.

[5] Parsons *v.* Keys, 43 Tex. 557.

[6] Brayshaw *v.* Eaton, 7 Scott, 183.

carriage, while others were delivered at the hotel; here it might be reasonably inferred, as the court decided, that the whole had come under the mother's inspection, so as to make the infant liable for the purchase.[1]

The English cases seem to lay especial stress upon the question whether articles are or are not of themselves necessaries. And it is held, not only that an infant may enter into a contract for necessaries for ready money, but that he may be bound by any reasonable contract for necessaries on a credit, though he has an income of his own, and an allowance amply sufficient for his support.[2] In South Carolina a contrary doctrine is maintained; namely, that an infant who is furnished with necessaries, or the means in cash of procuring them, by his parent or guardian, or from any other source, is *prima facie* not liable for necessaries furnished him on credit.[3] This is likewise the rule in some other States.[4] Claims against an infant for necessaries being perfectly valid at law, the creditor cannot sue in equity.[5] And while it is true that an infant cannot bind himself when he has a parent or guardian who supplies his wants, he may be bound by the purchase of necessaries under the express or implied authority of his guardian.[6] But not for anything absurd or improper in quantity or quality.[7] And where credit is given to a parent, the infant's estate is not answerable.[8]

The rule as to necessaries in general is, that it is the province of the court to determine whether the articles sued for are within the class of necessaries, and, if so, it is the proper duty of the jury to pass upon the questions of quantity, quality, and their adaptation to the condition and wants of the infant.[9] But, as the reader is already apprised, this rule is

[1] Dalton *v.* Gib, 5 Bing. N. C. 198; Atchison *v.* Bruff, 50 Barb. 381. And see Strong *v.* Foote, 42 Conn. 203.

[2] Burghart *v.* Hall, 4 M. & W. 727; Smith Contr. 273.

[3] Rivers *v.* Gregg, 5 Rich. Eq. 274. And see Mortara *v.* Hall, 6 Sim. 465.

[4] Nicholson *v.* Wilborn, 13 Ga. 467. In a suit to recover the price of necessaries sold to the defendant during minority, the burden is on the latter to show, by way of defence, that during minority his parent or guardian supplied him. Parsons *v.* Keys, 43 Tex. 557.

[5] Oliver *v.* McDuffie, 28 Ga. 522.

[6] Watson *v.* Hensel, 7 Watts, 344.

[7] Johnson *v.* Lines, 6 W. & S. 80.

[8] Sinklear *v.* Emert, 18 Ill. 63.

[9] Peters *v.* Fleming, 6 M. & W. 42;

neither stated nor applied with invariable precision in all cases. Generally, the question is one of fact for the jury; and the two principal circumstances are, whether the articles are suitable to the minor's estate and condition, and whether he is, or is not, without other means of supply.[1] An infant will be held to pay for necessaries what they are reasonably worth, but not what he may foolishly have agreed to pay for them.[2] Nor can the court be precluded, by the form of the contract, from inquiring into their real value.[3]

§ 414. **Contracts for Necessaries; Money advanced; Infant's Deed, Note, &c.; Equity Rules.** — An infant is liable to an action at the suit of a person advancing money to a third party to pay for necessaries furnished to the infant.[4] But it is thought to be otherwise as to money supplied directly to the infant, to be by him thus expended, notwithstanding the money be actually laid out for necessaries.[5] The reason for this distinction is said to be that in the latter case the contract arises upon the lending, and that the law will not support contracts which are to depend for their validity upon a subsequent contingency.[6] One writer admits that, according to some reports of a leading case, the court held that if the money were actually expended for necessaries the infant would be chargeable;[7] but adds that the weight of authority is, that the infant is not liable at law for money thus lent and appropriated.[8] What this weight of authority may be is not apparent, but the analogies elsewhere noticed as to a wife are to be considered as in point. The equity rule is, that if money is lent to an

Harrison *v.* Fane, 1 Man. & Gr. 550; Phelps *v.* Worcester, 11 N. H. 51; Merriam *v.* Cunningham, 11 Cush. 40; Beeler *v.* Young, 1 Bibb, 519.

[1] Per Shaw, C. J., Davis *v.* Caldwell, 12 Cush. 512.

[2] Locke *v.* Smith, 41 N. H. 346.

[3] See 10 Mod. 85; Met. Contr. 73; 2 Kent Com. 240; Parsons *v.* Keys, 43 Tex. 557.

[4] Swift *v.* Bennett, 10 Cush. 436; Randall *v.* Sweet, 1 Denio, 460.

[5] Macphers. Inf. 505, 506; Ellis *v.* Ellis, 5 Mod. 368; 12 Mod. 197; Earle *v.* Peele, 1 Salk. 386; Clarke *v.* Leslie, 5 Esp. 28.

[6] See Swift *v.* Bennett, 10 Cush. 436.

[7] Ellis *v.* Ellis, 12 Mod. 197.

[8] Met. Contr. 72. The learned writer quotes a *dictum* from 10 Mod. 67, to controvert that of 12 Mod. 197, which last held that money might be sometimes properly charged upon the infant. But the context only contemplates the "great difference between lending an infant money to buy necessaries, *and actually seeing the money so laid out.*" Besides, it is not clear which of the two is the better *dictum*.

infant to pay for necessaries, and it is so applied, the infant becomes liable in equity; for the lender stands in place of the payee.[1] And this is the New York doctrine, whether legal or equitable.[2] An innkeeper's lien on the baggage of his infant guest has been protected in our courts, notwithstanding the infant acted improperly and contrary to his guardian's wishes, so long as the innkeeper acted in good faith; and this, even to the extent of protecting the innkeeper for money furnished the infant, which was expended for necessaries.[3] Circuity of action should not be favored at this late day, especially when the object is, after all, to enforce a moral obligation in small transactions.

The old books say that an infant may bind himself by his deed to pay for necessaries.[4] Yet it has been considered clearly settled that he cannot do so by a bond in a penal sum; since it cannot be to his advantage to become subject to a penalty.[5] But on the question whether an infant is bound by a note not negotiable given for necessaries, there is an irreconcilable difference of opinion in the authorities; though Story considers the weight of modern English and American authorities greatly in favor of holding promissory notes given or indorsed by an infant voidable only, and therefore capable of being ratified after the party comes of age.[6] The mischief of holding an infant's promissory note for necessaries to be worthless is the same as in loans of money for the same purpose; namely, that an infant is thereby allowed to get his supplies without paying for them. Equity influences the later cases; that somewhat novel and yet manifestly just principle gaining ground that one who receives advantages is liable on an implied contract to furnish a suitable recompense. Reeve and others state the law thus: that an infant is not bound by any express contract for necessaries to the

[1] Marlow *v.* Pitfeild, 1 P. Wms. 558.

[2] Smith *v.* Oliphant, 2 Sandf. 306. And see Randall *v.* Sweet, 1 Denio, 460, per Bronson, C. J.

[3] Watson *v.* Cross, 2 Duv. 147.

[4] Com. Dig. Infant. But see next page.

[5] Ayliff *v.* Archdale, Cro. Eliz. 920; Corpe *v.* Overton, 10 Bing. 252; Smith Contr. 281; Met. Contr. 75.

[6] Story Prom. Notes, 6th ed. § 78, and cases cited. And see 2 Kent Com. 11th ed. 257; Bayley Bills, ch. 2, pp. 45, 46, 5th ed. See last chapter.

extent of such contract, but is bound only on an implied contract to pay the amount of their value to him; that when the instrument given by him as security for payment is such that, by the rules of law, the consideration cannot be inquired into, it is void and not merely voidable; that whenever the instrument is such that the consideration may be inquired into, he is liable thereon for the true value of the articles for which it was given.[1] This excellent statement could hardly be improved upon, except so far as equitable doctrine may properly enlarge the expression; and, for a topic so entirely unsettled, is as well entitled to be called good law as anything else. And, what is more, it has justice in it. The doctrine has received substantial encouragement in Massachusetts.[2] Even a bond for necessaries has been deemed binding in a State where the statute allows its consideration to be impeached and a judgment *pro tanto* rendered for the amount actually due.[3] The same practical result seems to be reached in New Hampshire, and other States, so as further to give the infant's indorser or surety a remedy against him;[4] and the broad doctrine conforms to equitable procedure in other analogous cases.[5]

[1] Reeve Dom. Rel. 229, 230; 2 Dane Abr. 364, 365; Met. Contr. 75.

[2] Stone *v.* Dennis, 13 Pick. 6, 7, per Shaw, C. J.; Earle *v.* Reed, 10 Met. 387.

[3] Guthrie *v.* Morris, 22 Ark. 411.

[4] M'Crillis *v.* How, 3 N. H. 348; Conn *v.* Coburn, 7 N. H. 368; Dubose *v.* Wheddon, 4 M'Cord, 221; Haine *v.* Tarrant, 2 Hill (S. C.), 400; McMinn *v.* Richmonds, 6 Yerg. 9. See, *contra*, Swasey *v.* Vanderheyden, 10 Johns. 33.

A late Indiana case tends in the same direction. Here it is said an infant is not liable at law on his note or other contract whereby he obtains money to build a barn or work his farm, although the money be actually expended for necessaries; since the indebtedness for necessaries for which he is liable must be created directly therefor. But, in equity, the infant is liable for the money so obtained, where the creditor can show that it was actually expended for necessaries. Price *v.* Sanders, 60 Ind. 310.

[5] We have seen a similar rule applied of inquiry into consideration in the case of a married woman's contract under equity and modern statutes. *Supra*, Part II. c. 11. An account for necessaries was allowed in equity, with a lien on the infant's reversionary interest, in a recent English case, although the minor's deed of sale of his reversionary interest, given during minority, as security, was declared not binding upon him. Martin *v.* Gale, 4 Ch. D. 628. A similar rule is observed in charging a married woman's separate estate. In a late Vermont case this later rule received a striking illustration. An infant boarded in a country town for some twenty weeks at a reasonable price. The person to whom he was indebted owed his own adult son money, and for the convenience

We may here add that infancy of the maker of a note does not excuse the want of a demand on him by the holder in order to charge the indorsee.[1]

§ 415. **Binding Contracts as to Marriage Relation; Promise to marry not binding.** — There are other contracts besides necessaries which are excepted from the general rule, and are made obligatory upon the infant; being neither void nor voidable.

Thus contracts of marriage are binding, if executed; they cannot be avoided on the ground of infancy, as we have shown in another connection;[2] while on the other hand no such considerations of policy attach to an infant's promise to marry, and such promise is not binding.[3] So, too, the general rights and liabilities of a husband as to custody, maintenance, and the like, which are incidental to the marriage relation, apply, from reasons of policy, to infants as to adults.[4] So is a contract for the burial of a spouse held beneficial and binding upon an infant.[5]

of the parties drew an order upon the infant, authorizing him to pay the amount of the board to his son; which order was duly received, and the infant agreed to pay it. Soon after, by consent of the parties, this order was surrendered, and the infant substituted in its place his promissory note. This note was negotiable, but never was negotiated; and the holder, the adult son of the person furnishing board, brought a suit thereon. The evidence showed that the defendant's board constituted the sole consideration of the note. It was held that the consideration of the note was open to inquiry, and that, upon the facts found, the defendant was liable to the plaintiff for the full amount of the note; and, as the court also decided, with interest. Bradley *v.* Pratt, 23 Vt. 378. Says the learned judge who gave the opinion in this case, after a full examination of the conflicting authorities as to the infant's liability on his promissory note for necessaries: "We may then, we think, regard the question as still *in dubio*, and justifying the court in treating it as still an open question. And being so, we should desire to put it upon safe and consistent ground. We are led, then, to inquire what is the true principle lying at the foundation of all these inquiries. We think it is, that the infant should be enabled to pledge his credit for necessaries to any extent consistent with his perfect safety. All the cases and all the elementary writers expressly hold that it is for the benefit of the infant that he should be able to contract for necessaries; and we see no reason why he may not be allowed to contract in the ordinary modes of contracting, so far as his perfect safety is maintained always." See Thing *v.* Libbey, 16 Me. 55; Ray *v.* Tubbs, 50 Vt. 688.

[1] Wyman *v.* Adams, 12 Cush. 210.

[2] See Husband and Wife, ch. 1; Bonney *v.* Reardin, 6 Bush, 34.

[3] Schoul. Hus. & Wife, §§ 24, 42; Rush *v.* Wick, 31 Ohio St. 521.

[4] Bac. Abr. Infancy and Age (B); 3 Burr. 1802; Met. Contr. 66.

[5] Chapple *v.* Cooper, 13 M. & W. 259; Schoul. Hus. & Wife, §§ 412, 413.

§ 416. **Acts which do not touch Infant's Interest; Where Trustee, Officer, &c.** — The acts of an infant that do not touch his interest, but which take effect from an authority which he is by law trusted to exercise, are binding; as if an infant executor receives and acquits debts to the testator, or an infant officer of a corporation joins in corporate acts, or any other infant does the duties of an office which he may legally hold.[1] And his conveyance of land which he held in trust for another, in accordance with the trust, is not to be disaffirmed by him on the ground of infancy; a principle which may extend sometimes to conveyances from a parent made to defraud creditors.[2] This seems to arise from the consideration which the law pays to the rights of others besides the infant; or, to put it differently, the doctrine may rest upon this fact, that the infant in such cases does not act as an infant. So the acts of the king cannot be avoided on the ground of infancy; partly for the same reasons, partly as one of the attributes of his sovereignty.[3] This attribute of sovereignty may perhaps enter as an element into the public acts of infants in this country who are improperly chosen to civil offices, yet whose official acts should be sustained.

§ 417. **Infant Members of Corporations.** — It is held that infants and married women, owning proprietary rights in townships, are not by reason of legal incapacity prevented from being bound by the acts of proprietors at legal meetings.[4] And the same is doubtless true of infant shareholders in corporations generally. Their incapacity would, otherwise, block the wheels of business altogether in matters where it is really property, and not persons, that are usually represented.[5]

§ 418. **Acts which the Law would have compelled.** — It is an old and well-settled doctrine that an infant will be bound by any act which the law would have compelled him to perform; as if the infant make equal partition of lands, or assign dower,

[1] Met. Contr. 66. See Butler *v.* Breck, 7 Met. 164; Roach *v.* Quick, 9 Wend. 238.

[2] Prouty *v.* Edgar, 6 Clarke (Iowa), 353; Starr *v.* Wright, 20 Ohio St. 97; Elliott *v.* Horn, 10 Ala. 348.

[3] Met. Contr. 66.

[4] Townsend *v.* Downer, 32 Vt. 183.

[5] As to the binding force of a decree in equity upon the infant's property, see *post*, c. 6.

or release an estate mortgaged on satisfaction of the debt.[1] But it is held that this rule does not apply to the case of a voluntary distribution: for the law, though it would have coerced a distribution, might not have made just such a one as was made by the parties.[2]

§ 419. **Contracts binding because of Statute; Enlistment; Indenture.** — Enlistments are binding contracts under appropriate public statutes.[3] Whenever a statute authorizes a contract which from its nature or objects is manifestly intended to be performed by infants, such a contract must, in point of law, be deemed for their benefit and for the public benefit; so that when *bona fide* made it is neither void nor voidable, but is strictly obligatory upon them. Yet if there be fraud, circumvention, or undue advantage taken of the infant's age or situation by the public agents, the contract could not, in reason or justice, be enforced.[4] And contracts of enlistment are not by our statutes usually made binding upon any infants under a prescribed age, without, at all events, the consent of parent or guardian.[5]

On like principles, a minor may be bound by his indentures of apprenticeship, executed in strict conformity to statute; these being likewise deemed for his benefit. By the custom of London, and under the laws of some States, the covenants of the minor apprentice are obligatory upon him. But it is otherwise by the common law of England, and also under the statutes of Elizabeth, and in New York, Massachusetts, and other States. Still, although the infant may not be liable for breach of his covenants, he cannot dissolve the indenture.[6] The English doctrine is that indentures are so far binding,

[1] Co. Litt. 38 *a*, 172 *a*; 3 Burr. 1801; Met. Contr. 67; Jones *v.* Brewer, 1 Pick. 314; Bavington *v.* Clarke, 2 Penn. 115; Prouty *v.* Edgar, 6 Clarke (Iowa), 353.

[2] Kilcrease *v.* Shelby, 23 Miss. 161.

[3] King *v.* Rotherfield Greys, 1 B. & C. 345; Commonwealth *v.* Gamble, 11 S. & R. 93; United States *v.* Bainbridge, 1 Mason, 83, before Story, J.

[4] United States *v.* Bainbridge, *supra*, 1 Mason, 83. And see Franklin *v.* Mooney, 2 Tex. 452.

[5] Matter of Tarble, 25 Wis. 390; *In re* McDonald, 1 Low. 100; Seavey *v.* Seymour, 3 Cliff. 439.

[6] Met. Contr. 66. But in some States he can. See Woodruff *v.* Logan, 1 Eng. 276; Stokes *v.* Hatcher, 1 South. 84; M'Dowles's Case, 8 Johns. 331; Blunt *v.* Melcher, 2 Mass. 228; Rex. *v.* Inhabitants of Wigston, 3 B. & C. 484; Clark *v.* Goddard, 39 Ala. 164; *infra*, Part VI. c. 1.

that the master may enforce his rights under them; and the legal incidents of service as apprentice attach to this relation; unless the master by his own misconduct deprives the infant of the benefits of the contract, in which case the law will release the latter from his bargain.[1]

§ 420. **Infant's Recognizance for Appearance on Criminal Charge.** — Partly out of respect to statute requirements, and partly, no doubt, because it is beneficial to one charged with crime to be allowed to enter into recognizance for his personal appearance in court, instead of suffering close confinement meantime, it is held that a minor defendant in criminal proceedings may bind himself personally by such recognizance, entered into after the usual form by himself and his sureties.[2]

§ 421. **Whether Infant's Contract for Service binds him.** — Apart from statutes prescribing differently, the executory contract of a minor, made without the consent of his parent or guardian, for employment for a certain or uncertain time, by means of which he may obtain necessaries or a livelihood, may be treated perhaps as void if positively disadvantageous in terms;[3] it is not by the better authorities to be considered as absolutely binding upon him, however fair and advantageous its provisions, to the extent of compelling him to fulfil stipulations like an adult; but so far as he himself is concerned it is usually voidable.[4] If the contract were made by parent or guardian, the employer's relation as to such a party would of course be different.

In this country, the cases are very common where a minor is said to be emancipated and entitled to contract for and receive his own wages. But the significance of the word "emancipation" is not exact; and, certainly, the legal obligation of the infant's contract for work is by no means commensurate with his right to the fruits of his own toil.[5] His

[1] 5 Dowl. & Ry. 339; 6 T. R. 558; Cro. Jac. 494; Cro. Car. 179; Met. Contr. 66; Rex *v.* Mountsorrel, 3 M. & S. 497.

[2] State *v.* Weatherwax, 12 Kan. 463.

[3] Regina *v.* Lord, 12 Q. B. 757; *supra*, § 403, and comments in note.

[4] See Person *v.* Chase, 37 Vt. 647, and other cases referred to in c. 5, *post*.

[5] As to the more general effect of a child's emancipation, see *supra*, Part III. c. 5.

legal capacity to do acts necessarily binding does not seem to be enlarged by the circumstance that his father has given him his time,[1] or that he serves out with neither parent nor guardian to assume liabilities to others for him.

CHAPTER IV.

THE INJURIES AND FRAUDS OF INFANTS.

§ 422. **Division of this Chapter.** — In this chapter we shall treat *first*, of injuries and frauds committed by an infant; *second*, of injuries and frauds suffered by an infant.

§ 423. **Injuries committed by Infant; Infant civilly Responsible.** — *First*, as to injuries and frauds committed by an infant. It is a general principle that infancy shall not be permitted to protect wrongful acts. To use the forcible expression of Lord Mansfield, the privilege of infancy is given as a shield and not a sword.[2] And minors are liable, not only for their criminal acts, but for their torts; and must respond in damages in all cases arising *ex delicto* to the extent of their pecuniary means, irrespective of the form of action which the law prescribes for redress of the wrong.[3]

An infant is then as fully liable as an adult in an action for damages occasioned by injury to the person or property of another by his wrongful act.[4] True, it has been observed, that where infants are the actors, that might probably be considered an unavoidable accident, which would not be so where the actors are adults.[5] But, says a writer, where the minor commits a tort with force, he is liable at any age; for in case of civil injuries with force, the intention is not regarded.[6]

[1] *Post*, c. 5.

[2] Zouch *v.* Parsons, 3 Burr. 1802.

[3] Met. Contr. 49; 1 Addis. Torts, 731; 8 T. R. 335; 2 Kent Com. 240, 241; School District *v.* Bragdon, 3 Fost. 507; Bullock *v.* Babcock, 3 Wend. 391; Oliver *v.* McClellan, 21 Ala. 675.

[4] Conklin *v.* Thompson, 29 Barb. 218.

[5] Bullock *v.* Babcock, 3 Wend. 391.

[6] Reeve Dom. Rel. 258. See Neal *v.* Gillett, 23 Conn. 437.

It follows from what we have said, that for an injury occasioned by an infant's negligence, he may be held civilly answerable. As where, in sport, he discharges an arrow in a school-room where there are a number of boys assembled, and thereby disables another;[1] or aims a missile at an older boy and accidentally hits another and younger one.[2] And even though under seven years of age, a child has been held liable in trespass for breaking down the shrubbery and flowers of a neighbor's garden.[3] But not for turning horses which were trespassing on his father's land into the highway, for this does not constitute a tort.[4] All the cases agree that trespass lies against an infant. And minors are chargeable in trespass for having procured others to commit assault and battery.[5]

But, supposing the trespass to have been committed by the express command of the father; is the infant then liable? So it was thought in a Vermont case, where the decision nevertheless rested on a different ground.[6] "An infant, acting under the command of his father, as a wife in the presence of her husband, might be excused from a prosecution for crime, if it should appear that the intent was wanting, or that he was acting under constraint; yet he is answerable *civiliter* for injuries he does to another."[7] And more recently this question is plainly decided in Maine, in the affirmative.[8] On the other hand, it would appear that an infant cannot be held responsible for torts committed by persons assuming to act under his implied authority; in other words, that his liability is not to be extended in any case beyond acts committed by himself or under his immediate and express direction.[9]

An infant in the actual occupation of land is responsible for nuisances and injuries to his neighbor, arising from the negligent use and management of the property.[10] And ejectment

[1] Bullock *v.* Babcock, 3 Wend. 391.
[2] Peterson *v.* Haffner, 59 Ind. 130; Conway *v.* Reed, 66 Mo. 346.
[3] Huchting *v.* Engel, 17 Wis. 231.
[4] Humphrey *v.* Douglass, 10 Vt. 71.
[5] Sikes *v.* Johnson, 16 Mass. 389; Tifft *v.* Tifft, 4 Denio, 177; Scott *v.* Watson, 46 Me. 362.
[6] Humphrey *v.* Douglass, 10 Vt. 71.
[7] Per Williams, C. J., *ib.*
[8] Scott *v.* Watson, 46 Me. 362.
[9] Robbins *v.* Mount, 4 Rob. (N. Y.) 553; Burnham *v.* Seaverns, 101 Mass. 360.
[10] 1 Addis. Torts, 731; McCoon *v.* Smith, 3 Hill, 147.

may be maintained against an infant for disseisin, that being a tort.

§ 424. **Immunity for Violation of Contract distinguished.** — The cases on the subject of an infant's torts do not seem quite consistent, so far as decisions upon the facts are concerned; but the principle which runs through them all serves to harmonize the apparent contradictions. This is the principle: that the courts will hold an infant liable for what are substantially his torts, but not for mere violations of a contract, though attended with tortious results, and though the party ordinarily has the right to declare in tort or contract at his election. It must be remembered that, for his contracts, the infant is not ordinarily liable: for his torts he is. And this distinction is at the root of the legal difficulty. The plaintiff cannot convert anything that arises out of a contract into a tort and then seek to enforce the contract through an action of tort. Therefore was it held that where a boy hired a horse and injured it by immoderate driving, this was only a breach of contract for which he was not liable.[1] Nor was he liable for breaking a borrowed carriage.[2] And where in an exchange of horses the infant had falsely and fraudulently warranted his mare to be sound, he was protected from the consequences on the same principle.[3]

The English cases, decided many years ago, exhibit a strong disposition to apply this rule in favor of an infant's exemption. And the language of the court in *Manby* v. *Scott*, with reference to the delivery of goods to an infant, and suit afterwards for trover and conversion, was that the latter shall not be chargeable: "for by that means all infants in England would be ruined."[4] Says a judge, deciding a case on the same general principle, "the judgment will stay for ever, else the whole foundation of the common law will be shaken."[5] But a more equitable principle pervades the later cases. Thus in an English case, where one twenty years old

[1] Jennings *v.* Rundall, 8 T. R. 335.

[2] Schenck *v.* Strong, 1 South. 87.

[3] Green *v.* Greenbank, 2 Marsh. 485; Howlett *v.* Haswell, 4 Campb. 118, Morrill *v.* Aden, 19 Vt. 505.

[4] 1 Sid. 129, quoted with approbation in Jennings *v.* Rundall, *supra*.

[5] Johnson *v.* Pye, 1 Keb. 905. See *n.* to Howlett *v.* Haswell, *supra*.

hired a horse for a ride, and was told plainly that it was not let for jumping, and notwithstanding caused the horse to jump a fence and killed the animal, he was held liable for the wrong.[1] And in Vermont an infant was held answerable, not many years ago, where he hired a horse to go to a certain place and return the same day, then doubled the distance by a circuitous route, stopped at a house on the way, left the horse all night without food or shelter, and by such overdriving and exposure caused the death of the horse.[2] This is the Massachusetts doctrine likewise.[3] The New Hampshire rule is that the infant bailee of a horse is liable for positive tortious acts wilfully committed, whereby the horse is injured or killed: though not for mere breach of contract, as a failure to drive skilfully.[4] The distinction to be relied upon is, that when property is bailed to an infant, his infancy protects him so long as he keeps within the terms of the bailment; but when he goes beyond it, there is a conversion of the property, and he is liable just as much as though the original taking was tortious.[5]

Chief Justice Marshall pronounces infancy to be no complete bar to an action of trover, although the goods converted be in the infant's possession in virtue of a previous contract. "The conversion is still in its nature a tort; it is not an act of omission but of commission, and is within that class of offences for which infancy cannot afford protection."[6] This doctrine is approved in New York.[7] And in Maine.[8] So, in England, detinue will lie against an infant, where goods were delivered for a special purpose not accomplished.[9] And the general rule seems to be now well established that an infant is liable for goods entrusted to his care, and unlawfully converted by him; though as to what would constitute such conversion, the authorities are not agreed.[10] Thus it is held that while a

[1] Burnard *v.* Haggis, 14 C. B. N. S. 45.

[2] Towne *v.* Wiley, 23 Vt. 355. And see Ray *v.* Tubbs, 50 Vt. 688.

[3] Homer *v.* Thwing, 3 Pick. 492.

[4] Eaton *v.* Hill, 50 N. H. 235.

[5] Towne *v.* Wiley, *supra*, per Redfield, J. The rule is otherwise in Pennsylvania. Penrose *v.* Curren, 3 Rawle, 351.

[6] Vasse *v.* Smith, 6 Cranch, 226.

[7] Campbell *v.* Stakes, 2 Wend 137.

[8] Lewis *v.* Littlefield, 15 Me 233

[9] Mills *v.* Graham, 4 B. & P. 140.

[10] See Story Bailments, § 50; 2 Kent Com. 241; Baxter *v.* Bush, 29 Vt. 465.

ship-owner cannot sue his infant supercargo for breach of instructions he may bring trover for the goods.[1] And an infant, prevailing on the plea of infancy in an action on a promissory note given by him for a chattel which he had obtained by fraud and refused to deliver on demand, has still been rendered liable to an action of tort for the conversion of the chattel: the original tort not having been superseded by a completed contract.[2] Replevin would lie for the goods even where a suit for damages might fail.[3] For stolen money and stolen goods converted into money, an infant is held liable in assumpsit.[4] Yet his conversion of specific goods should be carefully distinguished from what is in substance a breach of his contract to sell and account for profits.[5]

Where an action for money had and received was brought against an infant to recover money which he had embezzled, Lord Kenyon said that infancy was no defence to the action; that infants were liable to actions *ex delicto*, though not *ex contractu*, and though the action was in form an action of the latter description, yet it was in point of substance *ex delicto*.[6] For embezzlement of funds, therefore, an infant may be considered liable.[7] And in New York, and some other States, an infant is held responsible in tort for obtaining goods on credit, intending not to pay;[8] or for drawing a check fraudulently against a bank where he has no funds, in payment of his purchase.[9] In New Hampshire, the general rule is stated to be, that if false representations are made by an infant at the time of his contract, he may set up infancy in defence; but that if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful, and positive wrong of itself; then, although it may be connected with a contract, the infant is liable.[10]

[1] Vasse *v.* Smith, 6 Cranch, 226.

[2] Walker *v.* Davis, 1 Gray, 506. And see Fitts *v.* Hall, 9 N. H. 441.

[3] Badger *v.* Phinney, 15 Mass. 359.

[4] Shaw *v.* Coffin, 58 Me. 254; Elwell *v.* Martin, 32 Vt. 217.

[5] See Munger *v.* Hess, 28 Barb. 75. And see Burns *v.* Hill, 19 Ga. 22.

[6] Bristow *v.* Eastman, 1 Esp. 172.

[7] Elwell *v.* Martin, 32 Vt. 217.

[8] Wallace *v.* Morse, 5 Hill, 391, and cases cited. But the rule appears otherwise in Indiana. Root *v* Stevenson's Adm'r, 24 Ind. 115.

[9] Mathews *v.* Cowan, 59 Ill. 341.

[10] Fitts *v.* Hall, 9 N. H. 441; Prescott *v.* Norris, 32 N. H. 101.

§ 425. **Same Subject; Infant's Fraudulent Representations as to Age, &c.** — The plea of infancy has long been considered, both in England and this country, a good defence to an action for fraudulent representation and deceit. Thus, the rule is, that an infant who falsely affirms goods to be his own, and that he had a right to sell them, and thereby induces the plaintiff to purchase them, is not responsible.[1] For the plea of infancy, as it is sometimes said, will prevail when the gravamen of the fraud consists in a transaction which really originated in contract.[2] Still more frequently has it been held that for a false and fraudulent representation that he was of full age, there is no remedy against the infant; whether money were advanced or goods intrusted to him on the strength of such representation.[3] The reader must reconcile the sense of these rules with some of the foregoing cases as best he may. If anything be needed to show the inadequacy of common-law remedies for frauds and wilful misrepresentations, it is just such maxims as these, which have been perpetuated from the old books.

Upon common-law principle it may well be said that while an infant's false representation of full age or other material fraud may constitute a separate cause of action, as for a tort, it will not render his contract valid so as to estop him from avoiding it.[4] The result is circumlocution and uncertainty, oftentimes in trivial matters.

Chancery, handling its weapons with more freedom, is accomplishing results in this respect more widely useful. The doctrine of the English equity courts appears to have been, for years, that where payment is made to one falsely representing himself as an infant, this is a discharge for the

[1] Grove *v.* Nevill, 1 Keb 778; 1 Addis. Torts, 661; Prescott *v.* Norris, 32 N. H. 101; Morrill *v.* Aden, 29 Vt. 465. But see Word *v.* Vance, 1 Nott & M'Cord, 197.

[2] Gilson *v.* Spear, 38 Vt. 311.

[3] Johnson *v.* Pye, 1 Sid. 258; Price *v.* Hewett, 8 Exch. 146; s. c. 18 E. L. & Eq 522; Burley *v.* Russell, 10 N. H. 184; Conroe *v.* Birdsall, 1 Johns Cas. 127; Merriam *v.* Cunningham, 11 Cush. 40; Brown *v.* McCune, 5 Sandf. 224; Carpenter *v.* Carpenter, 45 Ind. 142.

[4] Carpenter *v.* Carpenter, 45 Ind. 142; Conrad *v.* Lane, 26 Minn. 389; Heath *v.* Mahoney, 14 N. Y. Supr. 100; Studwell *v.* Shapter, 54 N. Y. 249 And see Whitcomb *v.* Joslyn, 51 Vt 79; Hughes *v.* Gallans, 10 Phila. 618.

sum paid; but that where there was no such misrepresentation the trustee still remains liable; the mere belief that one was of age, of course, affording no ground of justification.[1] An English bankruptcy case of recent date carries the principle still farther; far enough to startle those who have reposed upon the assurance that the ancient judgments "will stay for ever." A young man, who from his appearance might well have been taken to be more than twenty-one years of age, engaged in trade, and wished to borrow or to obtain credit, and for the purpose of doing so represented himself to the petitioner as of the age of twenty-two, expressly and distinctly. It was held that, whatever the liability or non-liability of the infant at law, he had made himself liable in equity to pay that debt.[2] But in a somewhat later case, not inconsistent with these others, it was held that an infant's settlement upon his wife might be avoided by him on arriving at majority, notwithstanding there was some evidence that he fraudulently misstated his age to her solicitor; the fact being, however, that she, a widow of thirty-two, knew perfectly well that he was under age, and was not misled by his representations.[3]

The result of these late English decisions is to reopen in that country the whole subject of an infant's liability on his fraudulent misrepresentations; and considerable uncertainty appears to pervade the latest common-law decisions in that country, which incidently bear upon the subject.[4] Whether the new or the old doctrine is in the end to prevail, it is too

[1] Overton *v.* Bannister, 3 Hare, 503; Stikeman *v.* Dawson, 1 De G. & S. 90.

[2] *In re* Unity and Banking Association, 3 De G. & J. 63 (1858). Lords Justices Bruce and Turner concurred in this opinion, both expressing some reluctance in giving the judgment.

[3] Nelson *v.* Stocker, 4 De G. & J. 458 (1859). Lord Justice Turner, commenting upon the case, said: "There can be no doubt that it is morally wrong in an infant of competent age, as it is in any other person, to make any false representation whatever; but the observance of obligations or duties which rest only upon moral grounds cannot be enforced in chancery. Some wrong or injury to the party complaining must be shown." He further observes: "The privilege of infancy is a legal privilege. On the one hand, it cannot be used by infants for the purposes of fraud. On the other hand, it cannot, I think, be allowed to be infringed upon by persons who, knowing of the infancy, must be taken also to know of the legal consequences which attach to it." *Ib.* p. 465. See Inman *v.* Inman, L. R. 15 Eq. 260.

[4] See De Roo *v.* Foster, 12 C. B. N. S. 272 (1862); Wright *v.* Leonard, 11 C. B. N. S. 258.

early yet to say; but a collision has come, towards which equity and the common law were fast tending. Much, however, depends upon the position in which the infant's liabilities are presented in court.[1]

§ 426. **The Same Subject.** — The civil-law doctrine is clearly that if a minor represents himself of age, and from his person he appears to be so, any contract made with him will be valid; and the law protects those who are defrauded, not those who commit fraud.[2] And such was the Spanish law as formerly prevalent in our South-western States.[3] In a Maryland case, too, we find the suggestion that if an infant forms a partnership with an adult he holds himself out fraudulently to the world.[4] In Texas, the fraudulent representations of an infant are binding upon him.[5] Intimations are sometimes found in the courts as to gross frauds which might bind an infant.[6] And in Kentucky, not long since, the court refused to allow a deed made by a wife and her husband to be avoided on the ground of the wife's infancy, when, to induce the innocent purchaser to take the land, she and her husband had made oath before a magistrate that to the best of their knowledge and information she was more than twenty-one years old. This was a righteous decision.[7] In some other States an infant nearly of age who entraps another into a purchase or mortgage loan by direct participation in a fraud as to his or her age, has been estopped in chancery from attacking the title to the land

[1] Thus, very recently, where an infant had obtained a lease on a false representation that he was of full age, it was held in chancery that the lease must be declared void and possession given up, and the infant enjoined from parting with the furniture; but that the infant could not be made liable for use and occupation. Lemprière *v.* Lange, L. R. 12 Ch. D. 675.

[2] 1 Dom. pt. 1, b. 4, tit. 6, § 2.

[3] See able discussion of this subject by Hemphill, C. J., Kilgore *v.* Jordan, 17 Tex. 341. There is not another American case to be found where this subject is so fully discussed, in its civil-law, common-law, and English equity bearings (1870).

[4] Kemp *v.* Cook, 18 Md. 130. The remark is quoted as that of Lord Mansfield, in Gibbs *v.* Merrill, 3 Taunt. 307, but this must be an error, as no such language appears in the case referred to, while the decision went upon a totally different ground.

[5] Kilgore *v.* Jordan, 17 Tex. 341; Carpenter *v.* Pridgen, 40 Tex. 32.

[6] Stoolfos *v.* Jenkins, 12 S. & R. 399; 2 Kent Com. 241. And see Sterling *v.* Adams, 3 Day, 411; Davies, J., in Henry *v.* Root, 23 N. Y. 544.

[7] Schmitheimer *v.* Eiseman, 7 Bush, 298.

afterwards on that ground, and thereby perpetrating a fraud.[1] Beyond this there seems no special authority for asserting that the American doctrine on this subject is unsettled, or that it is likely to feel the change now going on in the English courts. In fact, an equity court in North Carolina refused, not many years since, to compel specific performance of an infant's contract on the alleged ground of fraudulent misrepresentation of his father and himself, that he was of full age ; following the old common-law rule instead of opposing it.[2] And in many States still an infant will not thus be debarred from disaffirming his conveyance at majority.[3]

But our American statutes sometimes quicken the infant's sense of honor. Thus, in Iowa, it is enacted that one who, in selling real estate, represents himself to be of full age, and induces the grantee to buy on the strength of that representation, cannot afterwards disaffirm his contract on the ground of infancy.[4] It would be well if similar statutes were enacted in every State. We assume, of course, in general, that the infant thus misrepresenting has reached years of discretion and in appearance might be taken for an adult.

§ 427. **Injuries, &c., suffered by Infants.** — *Second.* As to injuries and frauds suffered by infants. Infants have a right to sue, by guardian or next friend, to recover damages for injuries done to person or property by the tortious acts of another ; and the ordinary principles of law, in this respect, as to contributory negligence, apply to them as to adults.[5] But by reason of their tender years, their rights and remedies receive a somewhat peculiar treatment in the courts, as we proceed to show.

§ 428. **Same Subject; Child's Contributory Negligence.** — Thus it is held that a child eight years old may sue one who sells and delivers to him a dangerously explosive substance, such

[1] Ferguson *v.* Bobo, 54 Miss. 121. Here the fraud appears to have been perpetrated without any positive misstatement as to age.

[2] Dibble *v.* Jones, 5 Jones Eq. 389.

[3] Sims *v.* Everhardt, 102 U. S. Supr. 300.

[4] Prouty *v.* Edgar, 6 Iowa, 353.

[5] 1 Addis. Torts, 712. The youth of a person injured does not extend the liability of the person causing the injury, for the tortious acts of his servants. Sherman *v.* Hannibal R., 72 Mo. 62. And see *post*, Part VI. c. 4.

as gunpowder, though upon his own request.[1] Such actions are grounded upon the ignorance of the child and the negligence of those who fail to regard it.

The principle involved is precisely that of the case where a man delivers a cup of poison to an idiot or puts a razor into the hand of an infant. The child uses that ordinary care of which he is presumed capable at his age; and though this may amount, logically, to actual carelessness as applied among adults to the ordinary transactions of life, his right of action is not thereby forfeited.[2] Whoever, then, would avoid a suit like this, must regulate his own discretion to suit the party with whom he deals, and act at all times with befitting prudence.

But there are cases where the child himself may have no right of action for injuries received. As if he be technically a trespasser, and meddling with property which does not belong to him. Of this rule a recent English case affords an example, where a boy, four years old, coming from school, saw a machine exposed for sale in a public place, and by direction of his brother, seven years old, placed his fingers within the machine whilst another turned the crank and thereby crushed his fingers.[3] The court held that no action would lie. But if the trespass of the infant does not substantially contribute to produce the injury, it would appear that no defence can be legally interposed on this ground.[4] Thus, the mere fact that a youth gets upon a railroad car intending to ride without paying fare is held not to bring the case within the rule of contributory negligence.[5]

§ 429. **Same Subject; Contributory Negligence of Parent, Protector, &c.** — Another and the more common class of exceptions consists of cases where the parents or other persons having charge of the child have been guilty of negligence. The rule of New York, Massachusetts, Illinois, and some other States, is that a child too young to have discretion

[1] Carter *v.* Towne, 98 Mass. 567.

[2] Byrne *v.* New York Central R., 83 N. Y. 620.

[3] Mangan *v.* Atterton, L. R. 1 Ex. 239. And see Hughes *v.* McFie, 2 H. & C. 744; 33 L. J. (Ex.) 177.

[4] See Daley *v.* Norwich & Worcester R. R. Co., 26 Conn. 591.

[5] Kline *v.* Central Pacific R. R. Co., 37 Cal. 400.

for himself cannot recover if his protector fails to exercise ordinary care, but that he may if he uses such care as is usual with children of the same age, and the protector exercises ordinary care besides.[1] The English rule, as formerly understood, does not take into consideration the circumstance of the protector's negligence at all.[2] And in Vermont, Connecticut, Ohio, and Pennsylvania, the child's exercise of ordinary care appears alone to be regarded.[3] The latest English cases, however, lean toward the doctrine first above stated. Thus when the child, at the time of injury, was in the care of his grandmother, at a railroad station, where she had purchased tickets for both, it was held that the plaintiff was so identified with his grandmother that, by reason of her negligence, no suit was maintainable against the company.[4]

Where carelessness of a mother or other protector is alleged, in authorizing an exposure of the child, it may sometimes be said that the father or proper parent or guardian had conferred no authority.[5] To take common illustrations of this doctrine. Allowing a child seventeen months old to be in the public street without a suitable attendant is held to be a want of ordinary care on the parents' part, and if the child be run over there is no remedy.[6] But there are circumstances under which it would be found that the parent or protector of such a child was exercising ordinary care; while the child himself would be treated, doubtless, as incapable of personal negligence at so early an age, so as to defeat his right of action.[7] Suffering a boy eight or ten years old to

[1] Wright *v.* Malden & Melrose R. Co., 4 Allen, 283; Hartfield *v.* Roper, 21 Wend. 617; Downs *v.* New York Central R. R. Co., 47 N. Y. 83; Kerr *v.* Forgue, 54 Ill. 482; Schmidt *v.* Milwaukie, &c. R. R. Co., 23 Wis. 186; O'Flaherty *v.* Union R. R. Co., 45 Mo. 70; Baltimore, &c. R. R. Co. *v.* State, 30 Md. 47; Munn *v.* Reed, 4 Allen, 431; Lehman *v.* Brooklyn, 29 Barb. 236; City of Chicago *v.* Starr, 42 Ill. 174.

[2] Lynch *v.* Nurdin, 1 Q. B. 29. Doubted, however, in Lygo *v.* Newbold, 9 Exch. 302.

[3] Robinson *v.* Cone, 22 Vt. 213; North Penn. R. R. Co. *v.* Mahoney, 57 Penn. St. 187; Bellefontaine, &c. R. R. Co. *v.* Snyder, 18 Ohio St. 399; Daley *v.* Norwich & Worcester R. R. Co., 26 Conn. 591. But see Bronson *v.* Southbury, 37 Conn. 199.

[4] Waite *v.* North-Eastern R. R. Co., 5 Jur. N. S. 936.

[5] Pierce *v.* Millay, 62 Ill. 133.

[6] Kreig *v.* Wells, 1 E. D. Smith, 74.

[7] See Mangam *v.* Brooklyn R. R. Co., 38 N. Y. 455; Schmidt *v.* Milwaukie, &c. R. R. Co., 23 Wis. 186.

play on the street after dark is not necessarily negligence on the protector's part.[1] And even as to children four years of age or thereabouts, or perhaps younger, it is not expected that parents who have to labor for themselves and cannot hire nurses are to be without remedy for themselves or their children every time the child steps into the street unattended. What would be expected of the custodians of these tender beings is a degree of care or diligence suitable to the capacity of the child; in other words, ordinary care and prudence in watching and controlling the child's movements.[2] As to a child some twelve years of age travelling with his mother, and injured in stepping between cars, the right to sue is not necessarily defeated for the reason that she permitted him to go into another car from that where she was sitting, and he did so.[3] In fact, the circumstances of each case are fairly to be weighed by the jury. No child capable of running about can be kept tied up in the house and subjected to constant watch. The rule is reasonably and beneficially applied; and the circumstances are in general for the jury.[4]

[1] Lovett *v.* Salem, &c. R. R. Co., 9 Allen, 557.

[2] City of Chicago *v.* Major, 18 Ill. 360; O'Flaherty *v.* Union R. R. Co., 45 Mo. 70; Baltimore, &c. R. R. Co. *v.* State, 30 Md. 47.

[3] Downs *v.* N. Y. Central R. Co., 47 N. Y. 83.

[4] The principle may be further illustrated by a late Illinois case. A heavy counter, some eighteen feet long and three feet high, which had been placed across the sidewalk in one of the principal thoroughfares of Chicago, remained so for two or three weeks, when some children were climbing upon it and thereby caused it to fall over. One of the children, six years old, was injured and died, and the parents sued the city, under statute, for damages. The court held, upon the state of facts before them, that the action would not lie because there was negligence shown on both sides, — on the part of the city in allowing the counter to remain in that situation, and on the part of the parents in permitting the child, at his age, to roam the crowded thoroughfares of the city at a great distance from his home. The negligence on the part of the city was less than that attributable to the child's parents, and therefore there could be no recovery. City of Chicago *v.* Starr, 42 Ill. 174. In this case it was further suggested that the degree of carelessness is not to be judged from a single fatal accident; but that the question is rather what would have been the course of a prudent person prior to the accident. And the habitual carelessness of the parents in allowing the child to go about unattended was considered material. But see Kerr *v.* Forgue, 54 Ill. 482, limiting the rule. Perhaps the course most consistent with the latest authorities is to leave the question of negligence, so far as possible, with the jury, upon the state of facts presented.

Causa proxima non remota spectatur is the maxim usually applied in cases of torts, whether the plaintiff be infant or adult. But where the tort is occasioned by the negligence of one person, the infant is not debarred of his right to sue the other party who shared in it. As where a child too young to take care of himself — there being, we shall suppose, no negligence on the part of the parent — is in danger of being run over by a steam-engine, and some stranger catches him up, meaning to save his life, and imprudently rushes over the track and falls with the child. An accident so occasioned might, under some such circumstances, give a right of action against either the stranger or the railroad company, or against them jointly.[1]

§ 430. **Suits of Parent and Child for Injury; Loss of Services reckoned.** — We have already seen that a parent may sue for damages caused his child by another's wrong, as for loss of his child's services during the period of minority, since such services belong to the parent.[2] But for damages to the person involving a permanent injury reaching beyond one's minority, the minor is entitled in his own right to recompense for such prospective loss.[3]

§ 431. **Arbitration Compromise, and Settlement of Injuries committed or suffered by Infants.** — While an infant is liable for torts, it does not follow that his contracts in compensation for torts are binding. In fact, his submission to an award, and notes given or money paid in pursuance thereof, would follow the principle of void and voidable and binding contracts;[4] and, as we may presume, a note or other security given to settle damages may not be sued upon without inquiry into its consideration, but it shall be good to the same

[1] See North Penn. R. R. Co. *v.* Mahoney, 57 Penn. St. 187. The views expressed in this case may not meet, in all respects, the concurrence of other courts; but the principle extracted in the text seems to the writer a correct one. See further, as to slander of an infant, Hopkins *v.* Virgin, 11 Bush, 677. As to injury done to a minor servant, see De Graff *v.* N. Y. Central R., 76 N. Y. 125; Cooper *v.* State, 8 Baxt. 324; *post*, Part VI.

[2] Part III. c. 4, *supra*.

[3] Central R. R. *v.* Brimson, 64 Ga. 475, and cases cited.

[4] Hanks *v.* Deal, 3 M'Cord, 257; Pitcher *v.* Turin Plank Road Co., 10 Barb. 436; Ware *v.* Cartledge, 24 Ala. 622.

extent as the tort which constituted its basis.[1] And on the other hand, where he releases or compromises for any injury himself has sustained, the same rule applies.[2] The parent cannot sue, as such, for the child's injuries; neither can he make a binding compromise, except as to his own demand upon the defendant.[3]

CHAPTER V.

RATIFICATION AND AVOIDANCE OF INFANT'S ACTS AND CONTRACTS.

§ 432. **Infants may ratify or disaffirm Voidable Acts and Contracts.** — That indulgence which the law allows infants, to secure them from the fraud and imposition of others, can only be intended for their benefit, and therefore persons of riper years cannot take advantage of such transactions. The infant may rescind or disaffirm his own deed or contract; but the adult with whom he deals is held bound meantime, unless the transaction be void, and not voidable;[4] or one of those contracts which bind an infant from the outset.[5]

But the infant may confirm his voidable contract on arriving at full age; and if he does so by such writings, words, or acts as amount to a legal ratification or affirmance, he will become liable then and thereafter. But what is in law a sufficient ratification or affirmance remains to be considered.

§ 433. **Rule affected by Statute; Lord Tenterden's Act; Other Statutes.** — Much of the discussion on this point is now dispensed with, or rather diverted, in England, by a short statute to the effect that "no action shall be maintained whereby to

[1] See Ray *v.* Tubbs, 50 Vt. 688; *supra*, § 414.

[2] Baker *v.* Lovett, 6 Mass. 78.

[3] See Loomis *v.* Cline, 4 Barb. 453; Passenger R. R. Co. *v.* Stutler, 54 Penn. St. 375. But see Merritt *v.* Williams, 1 Harp. Ch. 306.

[4] Smith *v.* Bowen, 1 Mod. 25; 2 Kent Com. 236; Warwick *v.* Bruce, 2 M. & S. 205; Brown *v.* Caldwell, 10 S. & R. 114; *supra*, c. 2.

[5] *Supra*, c. 3.

charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith." [1] This statute is known as Lord Tenterden's Act. Here is a clear, precise, and definite rule; and any apparent want of equity is compensated by the certainty with which a very troublesome subject is managed, one which has so constantly led to unprofitable litigation. The same or similar provisions are to be found in the laws of some of our States.[2]

But even statutes will raise legal difficulties. And the difficulty which arises under this particular act is to distinguish ratification from a new promise. What is meant by a "ratification" in the words of this statute? The Court of Exchequer, some years since, admitting, in the course of argument, that the statute made a distinction between ratification and new promises, gave it as their opinion that any act or declaration which recognizes the existence of a promise as binding, is a ratification of it; and that the statute "ratification" goes so far as to comprehend such a ratification as would make a person liable as principal for an act done by another in his name.[3] And hence certain letters written by the defendant in reference to payment of his debt out of his money in the hands of a third party were held binding. More lately this definition of ratification was reconsidered by the same court in another case, where the correspondence was over a dishonored bill of exchange, and another person, not the infant, was to be primarily liable; and the judges were divided in opinion. But the disposition seemed to be to define ratification anew, as a willing admission that the party is liable and bound to pay the debt arising from a contract which he made when an infant.[4] Still later a man, being of

[1] Stat. 9 Geo. IV. c. 14, § 5 (1828).

[2] See Thurlow *v.* Gilmore, 40 Me. 378.

[3] Harris *v.* Wall, 1 Exch. 122.

[4] Mawson *v.* Blane, 10 Exch. 206; 26 E. L. & Eq. 560. See further, Smith Contr. 287. Lord Ellenborough considered it more correct to say, in general, that the infant makes a new promise after he comes of age. Cohen *v.* Armstrong, 1 M. & S. 724. As to what is a sufficient compliance with

age, signed the following statement at the foot of an account of the items and prices of goods furnished to him while an infant by the plaintiff: "Particulars of account to the end of 1867, amounting to £162 11*s.* 6*d.* I certify to be correct and satisfactory." It was held that this was not a sufficient ratification under the statute, because these words did not really admit the debt to be a debt existing and binding upon the defendant.[1]

Some statutes regard the allowance of a reasonable time only after attaining majority for disaffirmance of a contract made in infancy, requiring the infant both to disaffirm and to make restitution.[2] Others seek to prevent sales of the minor's property for some time after he reaches majority.[3]

§ 434. **Rule Independent of Statute; American Doctrine.** — Independently of all statutes, however, the question has been asked again and again, what language and what conduct on the part of the infant attaining to majority will suffice to give binding force to his acts originally voidable. The American cases on this point are very numerous. And it must be confessed that the more this subject has been discussed, the less it appears to be understood. Two principles are evidently in conflict: the one, that an infant should be protected against his own imprudence while under a disability; the other, that *bona fide* creditors ought not to be cheated. Some cases have given more prominence to the first principle, others to the second.

There cannot be much doubt that at the time Lord Tenterden's Act was passed, the English rule was, that an infant might, by his general conduct, independently of a precise

the statute, see Hartley *v.* Wharton, 11 Ad. & El. 934; Hyde *v.* Johnson, 2 Bing. N. C. 778; Hunt *v.* Massey, 5 B. & Ad. 902.

See also Infants' Relief Act of 1874 (37 & 38 Vict. c. 62). As to what constitutes ratification or a fresh promise upon majority, under English statutes, of an infant's promise to marry, see Ditcham *v.* Worrall, 5 C. P. D. 410; Northcote *v.* Doughty, L. R. 4 C. P. D. 385. As to ratifying as "a debt of honor," see Maccord *v.* Osborne, 1 C. P. D. 569. And see *In re* Onslow, L. R. 10 Ch. 373. The inclination of these late English cases is to insist upon something like a fresh promise in order to bind.

[1] Rowe *v.* Hopwood, L. R. 4 Q. B. 1.

[2] Wright *v.* Germain, 21 Iowa, 585; Jones *v.* Jones, 46 Iowa, 466.

[3] Soullier *v.* Kern, 69 Penn. St. 16.

promise or new contract, on his part, render himself liable for his contracts made while an infant.[1] The statute was passed to change this rule. On that point we need not dwell. This does not bind American courts, it is true, for they had adopted, in many instances, another rule of the common law to which they were at liberty to adhere, in spite of the later English decisions; since it was the rule our ancestors brought over with them.

Now, what is the American doctrine? We take a case decided within a few years in Massachusetts, where an infant had made a promissory note, and after majority admitted several times that he owed the debt, and said he would pay it when he could. Says the court: "It has long been settled that a direct promise, when of age, is necessary to establish a contract made during minority, and that a mere acknowledgment will not have that effect." [2] We take still another, decided in New York only a little later. Says a judge of the Court of Appeals, after a most exhaustive review of the cases: "I think that the course of decision in this State authorizes us to assume that the narrow and stringent rule, formerly enunciated, that to establish the contract, when made in infancy, there must be a precise and positive promise to pay the particular debt, after attaining majority, is not sustained by the more modern decisions." [3] Time has not with us lessened the force of Chancellor Kent's observation, many years ago, that "the books appear to leave the question in some obscurity, when and to what extent a positive act on the part of the infant is requisite." [4]

It may be remarked that a great change was gradually developed in the law of infancy, by making contracts voidable which before were deemed void.[5] This might reasonably be thought to have introduced a new element into the consideration of such cases; the result tending towards freedom in the courts, and enabling them to repudiate artificial refine-

[1] See Goode *v.* Harrison, 5 B. & Ald. 147; Smith Contr. 283, 284.

[2] Proctor *v.* Sears, 4 Allen, 95 (1862), per Metcalf, J.

[3] Per Davies, J., Henry *v.* Root, 33 N. Y. 545 (1865).

[4] 2 Kent Com. 237.

[5] See c. 2, *supra*.

ments and do substantial justice. It certainly throws upon the modern courts a greater responsibility than formerly in ruling between complete and incomplete ratification; or (if legal precision requires another expression), in determining whether a new promise has passed from the person after attaining full age. But this change has not always been kept in view. In New York the modern doctrine is that ratification or confirmation of the contract made in infancy will bind the party if it take place after his coming of age; that a new promise, positive and precise, equivalent to a new contract, is not now essential; but that a ratification or confirmation of what was done during the minority is sufficient to make the contract obligatory.[1] And it is well observed that the words "ratify and confirm" necessarily import that there was something in existence to which the ratification or confirmation could attach, entirely ignoring therefore the notion that an infant's obligations or contracts were extinguished by the state of infancy.[2] But it must be borne in mind that in some other States the rule is quite different. So that we have nothing which may safely be pronounced the American doctrine upon this subject.

§ 435. **The Same Subject; Instances.** — It seems settled that silence for an unreasonable time, taken in connection with other facts, such as using the property purchased, retaining possession of it, selling or mortgaging it, or in any way converting it to the infant purchaser's own use, would be sufficient ratification to bind the infant after reaching manhood.[3] As where a minor bought a yoke of oxen, for which he gave his note, and after arriving at full age converted the oxen to his own use and received the avails.[4] Mere lapse of time, it is true, will not usually amount to confirmation, unless

[1] Henry *v.* Root, 33 N. Y. 526.

[2] *Ib.*

[3] See note Am. editor in 16 E. L. & Eq. 558; Lawson *v.* Lovejoy, 8 Me. 405; Boyden *v.* Boyden, 9 Met. 519; Cheshire *v.* Barrett, 4 M'Cord, 241; Boody *v.* McKenney, 23 Me. 517; Robinson *v.* Hoskins, 14 Bush, 393.

[4] Lawson *v.* Lovejoy, 8 Me. 405. And see Alexander *v.* Heriot, 1 Bail. Ch. 223; Deason *v.* Boyd, 1 Dana, 45; Vandevort's Appeal, 43 Penn. St. 462; Stern *v.* Freeman, 4 Met. (Ky.) 309; Belton *v.* Briggs, 4 Desaus. 465.

the complete bar of limitations is fulfilled.[1] But a brief lapse of time, in connection with other circumstances, may amount to confirmation.[2] And cases are not wanting to establish the position that ratification will be inferred from tacit assent and delay under circumstances where silence is not excusable, where there was full knowledge and opportunity to assert one's rights, and the party whose title might have been disputed was permitted to go on incurring expense on the faith of it.[3]

Yet that the cases are somewhat conflicting and difficult in this respect to be reconciled will appear from the citation of a few. In Alabama, an infant, ten days before majority, purchased a note and drew an order upon a third person in payment, and received notice of non-payment. It was held, in a suit several years after, that his failure to renew the note and disaffirm warranted the conclusion that he intended to abide by it.[4] Still more rigidly was the same doctrine enforced in an earlier New York case.[5] Part-payment, or even promise of part-payment, may operate as confirmation.[6] So may authority given to an agent to pay, though the agent does nothing.[7] But declarations of affirmance by one purporting to act as the attorney or solicitor of the late infant do not amount to ratification if his authority be not proved.[8] Submitting the question of liability after coming of age to arbitration does not amount to ratification.[9] But letters indicating intent to abide by a former award may ; as well as the enjoyment of its benefits.[10] So may permitting an action growing out of the transaction to go by default, or a bill in equity to be taken as confessed.[11] A promise to settle by note against a third party is held sufficient.[12] So is a promise to settle by work.[13] Nor

[1] Wallace *v.* Latham, 52 Miss. 291; Prout *v.* Willey, 28 Mich. 164.

[2] Cresinger *v.* Welch, 15 Ohio, 156; Strong, J., in Irvine *v.* Irvine, 9 Wall. 617.

[3] See *post*, Ratification as to Real Estate; Allen *v.* Poole, 54 Miss. 323.

[4] Thomasson *v.* Boyd, 13 Ala. 419.

[5] Delano *v.* Blake, 11 Wend. 85.

[6] Little *v.* Duncan, 9 Rich. Law, 55; Stokes *v.* Brown, 4 Chand. (Wis.) 39.

[7] Orvis *v.* Kimball, 3 N. H. 314.

[8] Carrell *v.* Potter, 23 Mich. 377.

[9] Benham *v.* Bishop, 9 Conn. 330.

[10] Barnaby *v.* Barnaby, 1 Pick. 221; Jones *v.* Phœnix Bank, 4 Seld. 228.

[11] Terry *v.* McClintock, 41 Mich. 492.

[12] Taft *v.* Sergeant, 18 Barb. 320.

[13] Edgerly *v.* Shaw, 5 Fost. 514.

do the recent cases seem to require that a promise to settle should be very precisely expressed. The mere retention of consideration-money received during infancy appears to amount to ratification in California ; [1] but this is not the general rule elsewhere.[2] Keeping and using an article purchased during infancy, with equivocal expressions of intention, may bind the infant so that he cannot return it afterwards to the vendor. So may a sale of the article with full knowledge of the fact of purchase.[3] So may reception and enjoyment of the benefits of the transaction after reaching majority, such as collecting dividends or interest,[4] or receiving the principal, or other act totally inconsistent with an intention to disaffirm. A verbal promise is sufficient to bind.[5] A contract to work is ratified by continuance in the employer's service for a month after attaining full age.[6] Plea of the execution of a note, in defence of a suit in assumpsit, is held to be confirmation of the note itself.[7] Slight words, importing recognition and confirmation of the promise, have been treated as sufficient ; or, at least, as sufficient for a jury to consider.[8] And, according to a recent decision of the Supreme Court of the United States, it is a question for the jury and not for the court to decide, whether the evidence submitted in any case shows an affirmance or not, if there be any evidence tending to show it.[9]

On the other hand are numerous decisions which seem to bear against the creditor. Says a Massachusetts judge in an early case : " By the authorities a mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract made during minority." [10] Yet the much-quoted distinction there taken

[1] Hastings *v.* Dollarhide, 24 Cal. 195.

[2] Benham *v.* Bishop, 9 Conn. 330. See § 446 *post*, as to restoring the consideration.

[3] Shropshire *v.* Burns, 46 Ala. 108.

[4] Huth *v.* Carondolet R., 56 Mo. 202 ; Price *v.* Winter, 15 Fla. 66 ; Corwin *v.* Shoup, 76 Ill. 246.

[5] West *v.* Penny, 16 Ala. 186 ; Martin *v.* Mayo, 10 Mass. 137.

[6] Forsyth *v.* Hastings, 27 Vt. 646.

[7] Best *v.* Givens, 3 B. Monr. 72.

[8] Hoit *v.* Underhill, 9 N. H. 436 ; Bay *v.* Gunn, 1 Denio, 108 ; Whitney *v.* Dutch, 14 Mass. 457.

[9] Irvine *v.* Irvine, 9 Wall. 617, 628.

[10] Whitney *v.* Dutch, 14 Mass. 460, per Parker, C. J.

between "acknowledgment" that a debt is due, and verbal "ratification and confirmation" is either exceedingly subtile, or at the present day frequently misapplied. The distinction further developed leads, as we find, to the conclusion that where one says he owes the debt and has not the means of payment, but will pay as soon as able, or words to this effect, this is only an acknowledgment, and not binding.[1] Such decisions do not always support the explanation sometimes given, that the American cases proceed upon the ground of intention to ratify; though there are doubtless cases which support so reasonable a view.[2]

§ 436. **The Same Subject; Conflicting Dicta.** — What is it that suffices to take a case out of the statute of limitations? "Either an express promise to pay, or an unqualified acknowledgment of *present* indebtedness; in which latter case *the law will imply a promise to pay.*"[3] What is ratification of a contract? So far as a definition may be hazarded, it is a voluntary admission that one is liable and bound by the terms of an existing though inchoate or imperfect contract. A debt is, of course, created by contract express or implied. But some say that there must always be a new contract made by the minor on reaching majority. To hold that a new contract for payment is essential, differs certainly from ruling that ratification and confirmation of an existing contract binds one who was lately an infant. But once again such contracts of an infant are called voidable. Does not the term "voidable" imply something still different? something which binds until expressly repudiated? And if so, how doubly inconsistent to exact a specific promise to pay, over and above an admission of present indebtedness. In truth, the law is here overburdened with its own defini-

[1] See Proctor *v.* Sears, 4 Allen, 95; Thompson *v.* Lay, 4 Pick. 48; Ford *v.* Phillips, 1 Pick. 203; Hall *v.* Gerrish, 8 N. H. 374; Goodsell *v.* Myers, 3 Wend. 479; Wilcox *v.* Roath, 12 Conn. 550; Chandler *v.* Glover, 32 Penn. St. 509.

[2] See Thing *v.* Libbey, 16 Me. 55; Dana *v.* Stearns, 3 Cush. 372; Smith *v.* Kelly, 13 Met. 309. And see note to 16 E. L. & Eq. 558.

[3] See Gailey *v.* Crane, 21 Pick. 523; Wakeman *v.* Sherman, 5 Seld. 91; Marshall, C. J., in Clementine *v.* Williamson, 8 Cranch, 72; Story, J., in Bell *v.* Morrison, 1 Pet. 351.

tions; judicial terms, inconsistent and varied, bewilder the judicial mind; and thankless, indeed, must be the task of refining upon distinctions which rest upon no rational basis of difference.[1]

§ 437. **The Same Subject; Summary of Doctrine.** — The writer makes no attempt to reconcile the numerous *dicta* of the courts on this important subject. They are irreconcilable. If American decisions themselves may be regarded as pointing out a general rule, it seems to be this: that the mere acknowledgment that a certain transaction constitutes a debt is insufficient to bind him lately an infant; but that an acknowledgment to the extent that he justly owes that debt, with equivocal expressions as to some future payment, may or may not be considered sufficient, though the better opinion is in favor of their sufficiency; that acts or omissions on his part, which are prejudicial to the adult party's interests, or evince his own intention to retain the advantages of a contract made during infancy, may be, especially when reasonable time has elapsed, construed into a ratification, the presumption of honorable motives being fair and reasonable under such circumstances; and finally, that a distinct, unequivocal promise, verbal or written, made after attaining majority, is always sufficient, this apparently superseding the former promise altogether.[2] In cases of doubt, moreover, it would seem to be better to treat the evidence presented as constituting facts for the consideration of the jury, rather than a question of law for the court to pass upon.

Some cases go even farther, and require an express repudi-

[1] Lord Kenyon seems responsible for the doctrine that the case of infancy differs in essence from that under the statute of limitations. He says: "In the case of an infant, I shall hold an acknowledgment not to be sufficient, and require proof of an *express promise* to pay, made by the infant, after he had attained that age when the law presumes that he has discretion." Thrupp *v.* Fielder, 2 Esp. 628.

[2] See American cases collected in Am. editor's note to 16 E. L. & Eq. 558; Bobo *v.* Hansell, 2 Bail. 114; Ackerman *v.* Bunyou, 1 Hilt. (N. Y) 58; Vaughan *v.* Parr, 20 Ark. 600; Richardson *v.* Boright, 9 Vt. 368; Hodges *v.* Hunt, 22 Barb. 150; State *v.* Plaisted, 43 N. H. 413; Wright *v.* Steele, 2 N. H. 51; Conklin *v.* Ogborn, 7 Ind. 553; Merriam *v.* Wilkins, 6 N. H. 413; Jones *v.* Butler, 30 Barb. 641; Curtin *v.* Patton, 11 S. & R. 305; Norris *v.* Vance, 3 Rich. 164; Oswald *v.* Broderick, 1 Clarke (Iowa), 380.

ation on the infant's part. But this is appropriate only to peculiar transactions, and we are not justified in deducing therefrom a general principle that express repudiation is necessary in all voidable contracts of an infant; for the decisions certainly do not go to this length, whatever the *dicta*.[1] Express acts of disaffirmance or repudiation leave no doubt of intention on this point; and they, of course, suffice to avoid the contract made during infancy. As in a sale where one gives notice that he considers the bargain void, and offers to return the consideration.[2] There are many other ways in which one may clearly disavow his intention of carrying into effect the contract made during infancy; and if the transaction appears to have been made shortly before reaching majority, and not to be disadvantageous to the infant, his disavowal ought not to be inferred from his silence.[3]

A conditional promise, when of age, to perform a contract made during minority will not sustain an action thereon without proof that the condition has been fulfilled.[4]

Reasonable time for an infant, on coming of age, to elect to confirm or avoid the acts and contracts of his minority, must depend in each case upon the particular circumstances;

[1] See Holmes *v.* Blogg, 8 Taunt. 39; Richardson *v.* Boright, 9 Vt. 368; Kline *v.* Beebe, 6 Conn. 494; Hoit *v.* Underhill, 9 N. H. 439.

[2] See Willis *v.* Twombly, 13 Mass. 204; Aldrich *v.* Grimes, 10 N. H. 194; Williams *v.* Norris, 2 Litt. 157; Hill *v.* Anderson, 5 S. & M. 216; M'Gill *v.* Woodward, 3 Brev. 401; Scranton *v.* Stewart, 52 Ind. 69, 92.

[3] Davis *v.* Dudley, 70 Me. 266. Non-assertion of rights in a court of justice, where the courts are closed during war, cannot be construed into confirmation. Thompson *v.* Strickland, 52 Miss. 574. Nor can statements of record evidently referring to personal property be taken as confirmation of a conveyance of real estate. Illinois Land Co. *v.* Bonner, 75 Ill. 315. Equivocal acts very shortly after attaining majority should not be construed readily into a binding ratification or election not to avoid. Tobey *v.* Wood, 123 Mass. 88. Nor a transaction only remotely connected with the transaction to which he was a party in infancy. Todd *v.* Clapp, 118 Mass. 495. Notice of disaffirmance, given in writing, will suffice. Scranton *v.* Stewart, 52 Ind. 69, 92. Especially if this be consistently followed up by acts of ownership or such as indicate a claim of title adverse to the transaction of infancy. Tunison *v.* Chambly, 88 Ill. 378. Suing to set aside the transaction is a disaffirmance. Gillespie *v.* Bailey, 12 W. Va. 70. And see §§ 441, 442 *post*; Baker *v.* Kennett, 54 Mo. 82.

[4] Proctor *v.* Sears, 4 Allen, 95; Everson *v.* Carpenter, 17 Wend. 419; Chandler *v.* Glover, 32 Penn. St. 509; Huth *v.* Carondolet R., 56 Mo. 202.

and in all cases the mental operation of election at majority, whether outwardly manifested more or less plainly, and whether actually proved or to be conclusively assumed from long lapse of time and silence, is the fact to be legally established or inferred.[1] And such election once made is irrevocable.[2]

§ 438. **Rule as to Conveyance of Infant's Lands, Lease, Mortgage, &c.** — Apply the rule of ratification or avoidance to the infant's lands. If an infant makes a lease of his land (which is voidable if for his benefit, but not otherwise), and accepts rent after attaining full age, and by other slight acts affirms the transaction, this is a ratification, and he cannot afterwards disaffirm.[3] And where a minor mortgaged his land, and on coming of age conveys it to another person in fee, subject to the mortgage, which he recognizes in the second deed, it is held to be a ratification of the mortgage.[4] Ratification of a conveyance is ratification of the mortgage made to secure payment; he cannot repudiate the one and not the other.[5] So slight acts of assent on the infant's part are held sufficient to confirm leases made by a guardian beyond the term of his authority.[6] But an act of the late infant, clearly showing his intention not to be bound by his mortgage, is a sufficient avoidance of it.[7] A prompt declaration of his intention to disaffirm, and a conveyance to another, will answer.[8] The execution of a warranty deed to another without reservation of the mortgage incumbrance imports a disaffirmance of the mortgage.[9]

[1] Parke, B., says in Williams *v.* Moor, 11 M. & W. 256, 265, that the principle on which the law allows a party who has reached twenty-one to give validity to contracts entered into during his infancy, is, that he is supposed to have acquired the power of deciding for himself whether the transaction in question is of a meritorious character by which in good conscience he ought to be bound.

[2] If evidence of express disaffirmance is shown, acts tending to prove a prior full affirmance may be shown likewise. Scranton *v.* Stewart, 52 Ind. 69, 92.

[3] Ashfield *v.* Ashfield, W. Jones, 157; Wimberley *v.* Jones, 1 Ga. Dec. 91.

[4] Boston Bank *v.* Chamberlin, 15 Mass. 220; Story *v.* Johnson, 2 You. & Coll. Exch. 607; Phillips *v.* Green, 5 Monr. 355; Lynde *v.* Budd, 2 Paige, 191.

[5] Young *v.* McKee, 13 Mich. 552; Bigelow *v.* Kinney, 3 Vt. 353; Robbins *v.* Eaton, 10 N. H. 561.

[6] See Smith *v.* Low, 1 Atk. 489.

[7] State *v.* Plaisted, 43 N. H. 413.

[8] White *v.* Flora, 2 Overton, 426; Hoyle *v.* Stowe, 2 Dev. & Bat. 320.

[9] Dixon *v.* Merritt, 21 Minn. 196; Allen *v.* Poole, 54 Miss. 323.

As to the infant's mortgage, it may be further remarked that a minor cannot avoid a mortgage given to secure either real or personal property purchased by him without avoiding the sale also.[1] The purchase and mortgage back constitute one transaction. And an assignment of the mortgage will carry to the assignee all the mortgagee's rights, whether the infant affirms or disaffirms.[2] The subsequent ratification of a mortgage, as of other deeds, relates back to the first delivery, so as to affect all intermediate persons, except purchasers for a valuable consideration.[3] And where a loan of money was made to an infant for which he executed a bond and mortgage, and in a will made after he became of age directed the payment of "all his just debts" and died, it was held that the will sufficiently confirmed the mortgage.[4] Even notes given for the purchase-money of land, not secured by mortgage, have been equitably enforced; and the court has refused to permit the notes to be disaffirmed and the land reclaimed.[5] And yet the retention, after reaching majority, of the proceeds of land purchased and afterwards sold by the person while an infant, is not of itself sufficient to render him liable upon his covenant to pay an outstanding mortgage upon the land which he had assumed as part of the consideration of his purchase.[6] But allowing the mortgage to be foreclosed after majority, and a bill of foreclosure to be taken as confessed, may defeat the infant's equity.[7]

§ 439. **Same Subject; Infant's Conveyance, Lapse of Time, &c.**—It would seem that the infant is not precluded from disaffirming his conveyance of real estate by the mere lapse of time. Laches is not imputable to an infant.[8] Where land had been sold by an infant, it was said in a Connecticut case, years ago, the period of acquiescence being thirty-five years, that the infant ought to declare his disaffirmance within a reasonable time; and similar *dicta* may be found in other

[1] Heath *v.* West, 8 Fost. 101; Dana *v.* Coombs, 6 Greenl. 89.

[2] Ottman *v.* Moak, 3 Sandf. Ch. 431.

[3] Palmer *v.* Miller, 25 Barb. 399.

[4] Merchants' Fire Ins. Co. *v.* Grant, 2 Edw. Ch. 544.

[5] Weed *v.* Beebe, 21 Vt. 495.

[6] Walsh *v.* Powers, 43 N. Y. 23.

[7] Terry *v.* McClintock, 41 Mich. 492.

[8] Smith *v.* Sackett, 5 Gilm. 534.

courts; but there seems to be no doubt upon the decided cases, that mere acquiescence is no confirmation of a sale of lands unless it has been prolonged for the statutory period of limitation; and that an avoidance may be made any time before the statute has barred an entry.[1]

Whatever might be the effect of an infant's own fraud, as against himself, it would appear that a subsequent purchaser or mortgagee in good faith and for a valuable consideration, will hold his title as against a deed made by the owner during his minority, of which he has received neither actual nor constructive notice; and this, too, notwithstanding ratification or fraud of the minor might have rendered that deed valid.[2]

Yet lapse of time, together with slight circumstances, have in many instances sufficed to sustain an infant's deed. A Missouri case, indeed, holds that mere declarations or a promise upon contingency will not ratify and confirm.[3] But the authorities generally manifest extreme repugnance at setting aside a solemn conveyance of land and reopening beneficial transactions, merely to suit the caprice or dishonorable intent of infants.[4] This may explain another *dictum* to the effect that an infant's deed will be confirmed by any deliberate act after he becomes of age, by which he takes benefit under it or recognizes its validity;[5] which is not without precedents for support. Thus, in some instances where the infant, after coming of age, saw the purchaser make valuable improvements and incur considerable expense, and said nothing for years, he was held bound.[6] So, too, it would seem, where

[1] 1 Am. Lead. Cas. 4th ed. 256; Met. Contr. 60, 61, and cases cited; Tucker *v.* Moreland, 10 Pet. 58; Boody *v.* McKenney, 23 Me. 517; Drake *v* Ramsay, 5 Ohio, 251; Jackson *v.* Burchin, 14 Johns. 124; Urban *v.* Grimes, 2 Grant, 96; Vaughan *v.* Parr, 20 Ark. 600; Voorhies *v.* Voorhies, 24 Barb. 150; Ware *v.* Brush, 1 McLean, 533; Moore *v.* Abernethy, 7 Blackf. 442; Cole *v.* Pennoyer, 14 Ill. 158; Gillespie *v.* Bailey, 12 W. Va. 70 (the case of an infant tenant in common); Wallace *v.* Latham, 52 Wis. 291; Prout *v.* Wiley, 28 Mich. 164.

[2] Black *v.* Hills, 36 Ill. 376; Inman *v.* Inman, L. R. 15 Eq. 260; Weaver *v.* Carpenter, 42 Iowa, 343.

[3] Clamorgan *v.* Lane, 9 Mo. 446; And see Davidson *v.* Young, 38 Ill. 145.

[4] See cases cited in preceding paragraph.

[5] McCormic *v.* Leggett, 8 Jones, 425.

[6] Wheaton *v.* East, 5 Yerg. 41; Wallace *v.* Lewis, 4 Harring. 75; Jones *v.* Phenix Bank, 4 Seld. 235; Davis *v.* Dudley, 70 Me. 236.

one knowing his title, permits another to purchase without giving notice of his claim.[1] While mere lapse of time less than the statute period will not suffice, yet the lapse of a less period in connection with such circumstances may. A tribunal of justice may properly decline to become the instrument of a knave. So, in Illinois, and some other States, the statute makes conveyances of a minor binding, unless disaffirmed and repudiated within a certain period, say three years after reaching majority.[2] In short, there is, according to the best authorities, a well-recognized distinction between the nature of those acts which are necessary to avoid an infant's deed, and those which are sufficient to confirm it. The deed cannot be avoided except by some solemn act, or, as some assert, an act equally solemn with the deed itself; but acts of a character which would be insufficient to avoid such a deed may amount to an affirmance of it.[3]

The purchaser of an infant's lands succeeds to all the infants's rights in relation to it, although those rights grow out of his infancy.[4] And a party in possession under the infant's deed cannot be regarded as a trespasser before the deed is avoided.[5]

§ 440. **The Same Subject; Entry, &c.** — A conveyance, in due season after majority, to a third person has been taken to be sufficient disaffirmance of the minor's deed, especially when coupled with express notice of disaffirmance, and followed by the grantee's entry.[6]

[1] Hall *v.* Simmons, 2 Rich. Eq. 120; Alsworth *v.* Cordtz, 31 Miss. 32; Belton *v.* Briggs, 4 Desaus. 465; Cresinger *v.* Welch, 15 Ohio, 156; Emmons *v.* Murray, 16 N. H. 385.

[2] Blankenship *v.* Stout, 25 Ill. 132; Wright *v.* Germain, 21 Iowa, 585. And see Ferguson *v.* Bell, 17 Mo. 347; Bostwick *v.* Atkins, 3 Comst. 53; Pursley *v.* Hays, 17 Iowa, 311; Sheldon *v.* Newton, 3 Ohio, N. S. 494; Rainsford *v.* Rainsford, Spears Ch. 385. Forgetfulness of the deed in infancy is no sufficient excuse for delay to disaffirm. Tunison *v.* Chamblin, 88 Ill. 378.

[3] Irvine *v.* Irvine, 9 Wall. 617. Here taking a lease of part of the premises from the person to whom he had conveyed when an infant was held proper evidence of affirmance. And see Phillips *v.* Green, 5 Monr. 344; Scott *v.* Buchanan, 11 Humph. 468; Allen *v.* Poole, 54 Miss. 323; Johnston *v.* Furnier, 69 Penn. St. 449; *Re* Wood, 71 Mo. 623; Houser *v.* Reynolds, 1 Hayw. 143.

[4] Thompson *v.* Gaillard, 3 Rich. 418. See Jackson *v.* Todd, 6 Johns. 257; Hall *v.* Jones, 21 Md. 429.

[5] Wallace *v.* Lewis, 4 Harring. 75.

[6] See Prout *v.* Wiley, 28 Mich. 164; Riggs *v.* Fisk, 64 Md. 100.

Whether it is necessary that an entry upon the land to regain seisin be made to perfect the title of the person intending to disaffirm his conveyance as infant, does not clearly appear from the authorities. The old rule was that in order to avoid a feoffment this was necessary. But conveyance by feoffment has been superseded by other methods of transferring real property in England, and it is not in use here. In some of the earlier New York cases, where an infant had sold wild lands to other persons, and had, after coming of age, conveyed by similar deed the same lands to another, it was held that the first conveyance had been legally avoided, and the last purchaser was entitled to the property.[1] A case before the Supreme Court in the United States is supposed to sustain the same view; only *arguendo*, however, for in point of fact the person making the second conveyance remained in possession all the time; and, as the court observed, "could not enter upon himself."[2] Following the indication of these three important cases, several of the State courts have since held that a conveyance by an infant of the same land to another person, after he comes of age, effectually avoids a deed of bargain and sale made in infancy; and this without entry on his part.[3] But the New York courts have latterly been disposed to retrace their steps; reluctance to do injury to others, doubtless, contributing to increase the strictness of requirements on the infant's part. Their present rule appears to be that, unless the lands were wholly vacant, or the infant remained in possession, he must make an entry or do some other act of equal notoriety before he can pass title by a second conveyance.[4] There is no authority in the New England States to oppose this later doctrine; nor do we find any in the other Middle States.[5] But doubt is removed by stat-

[1] Jackson *v.* Carpenter, 11 Johns. 539; Jackson *v.* Burchin, 14 Johns. 124. See Met. Contr. 44, 45, where this subject is discussed.

[2] Tucker *v.* Moreland, 10 Pet. 58, per Story, J.

[3] Hoyle *v.* Stowe, 2 Dev. & Bat. 320; Pitcher *v.* Laycock, 7 Ind. 398; McGan *v.* Marshall, 7 Humph. 121; Hughes *v.* Watson, 10 Ohio, 127; Peterson *v.* Laik, 24 Mo. 541.

[4] Dominick *v.* Michael, 4 Sandf. 421; Bool *v.* Mix, 17 Wend. 133; Voorhies *v.* Voorhies, 24 Barb. 150.

[5] See Roberts *v.* Wiggin, 1 N. H. 75; Worcester *v.* Eaton, 13 Mass. 375. See also Harrison *v.* Adcock, 8 Ga. 68; Moore *v.* Abernethy, 7 Blackf. 442.

utes, in Maine, Massachusetts, and some other States, which permit parties to recover land by writ of entry without making actual entry. And it is held in Maine that such a writ dispenses with entry and amounts to disaffirmance.[1]

To render a subsequent conveyance an act of dissent to the prior conveyance of an infant, it must be inconsistent therewith, so that the two cannot stand together.[2] And it is held that where land was conveyed by a person under age in exchange for other lands, and he, after coming of age, sells and conveys the lands so received, the last deed amounts to a confirmation of the first.[3]

§ 441. **Ratification, &c., as to an Infant's Purchase.** — The same reasoning which applies to property transferred by the infant applies to his purchases. If an infant, for instance, takes a conveyance of land during minority and retains possession after coming to majority, circumstances may make that a binding transaction. So if an infant lessee remains in possession of the house or land demised, and pays rent after majority, he cannot repudiate the lease afterwards.[4]

When an infant purchases property, and continues to enjoy the use of the same, and then sells it or any part of it, and receives the money for it, he must be considered as having elected to affirm the contract, and he cannot afterwards avoid payment of the consideration.[5] Some authorities would con-

[1] Chadbourne *v.* Rackliff, 30 Me. 354. And see Cole *v.* Pennoyer, 14 Ill. 158. Judge Metcalf appears to doubt the correctness of the rule in Jackson *v.* Carpenter, even as to cases of wild lands. See Met. Contr. 45, 46, and cases cited. A bill to enforce specific performance of an infant's contract to sell real estate should not be brought before a reasonable time has elapsed, after the infant attains majority, for him to affirm or disaffirm. Walker *v.* Ellis, 12 Ill. 470; Petty *v.* Roberts, 7 Bush, 410; Griffis *v.* Younger, 6 Ired. Eq. 520; Carrel *v.* Potter, 23 Mich. 377. As to the ratification necessary to allow of enforcing a lien on real estate for work and materials furnished during infancy, see McCarty *v.* Carter, 49 Ill. 53. But acquiescing in the settlement of boundaries after coming of age binds the infant. George *v.* Thomas, 16 Tex. 74.

[2] Leitensdorfer *v.* Hempstead, 18 Mo. 269 · McGan *v.* Marshall, 7 Humph. 121.

[3] Williams *v.* Mabee, 3 Halst. Ch. 500.

[4] Holmes *v.* Blogg, 8 Taunt. 35; Smith Contr. 284; Bac. Abr. tit. Infant, K. 612; Baxter *v.* Bush, 29 Vt. 465; Armfield *v.* Tate, 7 Ired. 258.

[5] Boody *v.* McKenney, 10 Shep. 517; Hubbard *v.* Cummings, 1 Me. 11; Boyden *v.* Boyden, 9 Met. 519; Robbins *v.* Eaton, 10 N. H. 561.

fine the affirmation of a purchase of land to an actual subsequent sale, but this is quite unreasonable, and contrary to the general doctrine; for there may be many other acts which constitute just as full and undoubted evidence of a design on the infant's part to affirm such contract as an actual sale of the land. Thus continuous occupation of premises, improvements, and offers to sell, have sometimes been deemed sufficient.[1] And Chief Justice Shaw observes that if an infant, after coming of age, retains landed property purchased by him during minority for his own use, or sells or otherwise disposes of it, such acts being only conscientiously done with intent to ratify or affirm, affirmation or ratification may be inferred.[2] The same principle has been declared in other cases, even to the extent of holding that mere continuance in possession is an affirmance; the more so, if the late infant has put it out of his power to restore the title.[3] It will be observed that such latter conduct involves two elements: lapse of time and the exercise of acts of ownership.[4]

§ 442. **Executory Contracts, &c., Voidable during Infancy; how Affirmed or Disaffirmed.** — As to deeds passing a voidable title to land out of the infant we have seen that he cannot elect to disaffirm or ratify until he attains majority. But with regard to an infant's executory contracts, or transactions importing on his part the fulfilment of duties, during the period of infancy, which might be prejudicial or irksome, he is allowed to disaffirm and avoid during infancy, wherever the contract was not of that beneficial or positive kind which the law pronounces binding. This is strictly in accordance with the general doctrine that one shall not be prejudiced by his own acts committed while an infant. Thus, if the infant

[1] See Robbins *v.* Eaton, 10 N. H. 561.

[2] See Boyden *v.* Boyden, 9 Met. 519.

[3] Dana *v.* Coombs, 6 Greenl. 89; Cheshire *v.* Barrett, 4 M'Cord, 241; Lynde *v.* Budd, 2 Paige, 191; Middleton *v.* Hoge, 5 Bush, 478.

[4] This rule was applied in a recent well-considered New York case, upon a full examination of the authorities An infant had given his note for certain real estate; and, very foolishly, or very dishonorably, endeavored to avoid payment upon majority, while holding to the benefits of his purchase. It was held that by his acts he had ratified the contract of purchase. Henry *v.* Root, 33 N. Y. 526.

promises during infancy to marry, he need not fulfil that promise; if he make a stock contract he can repudiate it at any time and thereby avoid the onerous responsibility of continuing to pay assessments;[1] if he has become a partner he may rid himself, before majority, of the injudicious compact.[2] A disaffirmance during infancy, where thus permitted, may require something different from disaffirmance at majority, something more explicit perhaps, and nearer to an express repudiation; though each case, as in the case of election at majority, should be governed by its own circumstances. The executory contract of an infant to convey or transfer his real or personal property cannot be specifically enforced against him, nor made the basis of an action of damages;[3] nor, on the other hand, can his executory contract to buy real or personal property, or to mortgage or give security, be compelled; but in either case the right of affirmance or disaffirmance is left open to him.[4]

§ 443. **Rule applied to Infant's Contract of Service.** — Thus, too, although it may be said that one's fully executed contract for service cannot be re-opened, if beneficial to him, to the adult party's detriment, the general rule, independently of the apprentice acts, is that an infant who contracts to perform labor for a fixed time at a definite rate may put an end to it whenever he chooses during minority, and claim compensation *pro rata* for his services.[5] Infants, acting upon bad

[1] Dublin & Wicklow R. *v.* Black, 8 Ex. 181; Indianapolis Chair Co. *v.* Wilcox, 59 Ind. 429; Robinson *v.* Weeks, 56 Me. 102.

[2] Goode *v.* Harrison, 5 B. & Ald. 147; Dunton *v.* Brown, 31 Mich. 82.

[3] Walker *v.* Ellis, 12 Ill. 470; Petty *v.* Roberts, 7 Bush, 410; Griffis *v.* Younger, 6 Ired. Eq. 520. And see Mustard *v.* Wohlford, 15 Gratt. 329.

[4] See Riley *v.* Mallory, 33 Conn. 201. An infant who bids for property at an auction is not obliged to execute the purchase. Shurtleff *v.* Millard, 12 R. I. 272.

[5] Person *v.* Chase, 37 Vt. 647; Van Pelt *v.* Corwine, 6 Ind. 363; Ray *v.* Haines, 52 Ill. 485; Davies *v.* Turton, 13 Wis. 185; Moses *v.* Stevens, 2 Pick. 332; Mason *v.* Wright, 13 Met. 306; Gaffney *v.* Hayden, 110 Mass. 137; Spicer *v.* Earl, 41 Mich. 191; Lufkin *v.* Mayall, 5 Fost. 82; Francis *v.* Felmet, 4 Dev. & Bat. 498; Judkins *v.* Walker, 17 Me. 38; Nashville, &c. R. Co. *v.* Elliott, 1 Cold. 611. But see Weeks *v.* Leighton, 5 N. H. 343; Harney *v.* Owen, 4 Blackf. 336; Wilhelm *v.* Hardman, 13 Md. 140; M'Coy *v.* Huffman, 8 Cow. 84; Medbury *v.* Watrous, 7 Hill, 110. As to the more general effect of emancipation, see *supra*, Part III. c. 5.

advice, however, have sometimes the effrontery, after rescinding a contract of service beneficial to themselves, to demand wages from their employers, without the allowance of reasonable offsets; but the courts are not so foolish as to indulge them often in this respect; hence, in numerous instances, it is decided that where an infant puts an end to his contract of service, his demand for proportional wages is subject to the reasonable deduction of his employer for part-payments, board, and necessaries furnished him during the same period. even to the entire extinction of his own claim.[1] And the injury sustained by his employer will be not unfrequently taken into account.[2] But the infant cannot be sued for breach of his agreement of service.[3] Of course he may set off his own labor against the employer's demand for necessaries.[4] The mutual understanding of the parties as to whether the infant's services should be paid for, or counterbalanced completely by his board and education, should be regarded in every case, upon examination of the circumstances.[5] And if the infant continues in service after he becomes of age, without demanding increase of wages or other modification of the contract, this is good evidence of his affirmance of the contract.[6]

[1] Thomas *v.* Dike, 11 Vt. 273; Hoxie *v.* Lincoln, 25 Vt. 206; Lowe *v.* Sinklear, 27 Mo. 308; Stone *v.* Dennison, 13 Pick. 1; Squier *v.* Hydliff, 9 Mich. 274; Wilhelm *v.* Hardman, 13 Md. 140; Roundy *v.* Thatcher, 49 N. H. 526.

[2] Thomas *v.* Dike, 11 Vt. 273; Hoxie *v.* Lincoln, 25 Vt. 206; Lowe *v.* Sinklear, 27 Mo. 308; Moses *v.* Stevens, 2 Pick. 336. *Contra*, Meeker *v.* Hurd, 31 31 Vt. 639; Derocher *v.* Continental Mills, 58 Me. 217.

[3] Frazier *v.* Rowan, 2 Brev. 47.

[4] Francis *v.* Felmet, 4 Dev. & Bat. 498.

[5] Mountain *v.* Fisher, 22 Wis. 93; Garner *v.* Board, 27 Ind. 323. A case occurred in Massachusetts a few years ago, where an infant, in consideration of an outfit to enable him to go to California, agreed, with his father's assent, to give the party furnishing the outfit one third of all the avails of his labor during his absence, which he afterwards sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was held that he could not rescind the agreement and recover the amount sent, deducting the cost of the outfit and any other money expended for him under the agreement. Breed *v.* Judd, 1 Gray, 455. This offer, the court observed, would not place the parties *in statu quo*, for the defendants took the risk of the life, health, and good fortune of the plaintiff. Under all the circumstances of the case, the sum advanced was held to be a reasonable consideration for a third part of the proceeds of the plaintiff's labor.

[6] Spicer *v.* Earl, 41 Mich. 191. Says Cooley, J., of repudiation in such

It is a well-known principle that when a contract is dissolved by mutual consent, *pro rata* wages may be recovered without express agreement. This applies to infants as well as adults. But a father is so far bound by his son's contract that his own claim for compensation depends upon his son's proper performance.[1] The employer, on the other hand, cannot make a new contract with the minor, so as to supersede the first one, without the assent of the father, or other person with whom the original contract was made.[2] But it is held that a contract of hiring between an infant and a third person is not rendered inoperative on the infant's part merely for want of the parent's previous consent; the infant not having avoided the contract, and the parent making no effort to assert his paramount rights.[3]

§ 444. **Parents, Guardians, &c., cannot render Contract Obligatory upon the Infant, &c.** — A contract made by a parent, or guardian, or a stranger, in an infant's name, acquires no obligatory force against the infant himself, apart from the latter's knowledge or consent; and if it be the infant's own contract, then the usual right of ratification or avoidance remains open to him.[4] One who assumes for an infant a mortgage debt, or a deficiency upon foreclosure of the infant's land, or makes any undertaking for the infant upon a voidable obligation, cannot render the infant personally liable.[5] Nor can a father sue on his child's voidable contract as the child's substitute.[6]

On the other hand a third person not in privity with the infant, has no right to say that the infant shall not on majority make or assume any contract he pleases.[7]

cases: "Where only the infant's services are in question, the rule should not be extended beyond what is absolutely necessary to proper protection; it should not be allowed to become a trap for others, by means of which the infant may perpetrate frauds."

[1] Rogers *v.* Steele, 24 Vt. 513. See Thomas *v.* Williams, 1 Ad. & E. 685; Roundy *v.* Thatcher, 49 N. H. 526.

[2] McDonald *v.* Montague, 30 Vt. 357. And see Gates *v.* Davenport, 29 Barb. 160. See also Parent and Child, *supra*.

[3] Nashville, &c. R. R. Co. *v.* Elliott, 1 Cold. 64.

[4] Armitage *v.* Widoe, 36 Mich. 124.

[5] Bicknell *v.* Bicknell, 111 Mass. 265; Wood *v.* Truax, 39 Mich. 628.

[6] Osburn *v.* Farr, 42 Mich. 134.

[7] Douglas *v.* Watson, 34 E. L. & Eq. 447.

§ 445. **Miscellaneous Points; As to New Promise; Whether Infant affirming must know his Legal Rights.** — Where a new promise is requisite on reaching majority, it must be made to the party with whom the infant contracted, or to his agent or attorney; not to a stranger.[1] But a promise to an agent authorized to present the claim and receive payment and give discharge binds him lately an infant.[2] And where a writing addressed to another than the plaintiff is relied on, not as constituting a ratification or containing a promise, but as evidence of a ratification previously made by the defendant, it is held admissible in the plaintiff's favor.[3] Nor is it necessary that the agent should have disclosed his authority before the defendant made his admission.[4]

It is not essential to a valid ratification that the person lately an infant should know that he was not legally liable on his contract made during infancy.[5] Ignorance of the law excuses no one. But there is a *dictum* of Lord Alvanley to the contrary, which has been frequently repeated in American courts, and once constituted the basis of a decision in Pennsylvania.[6]

§ 446. **Whether Infant who disaffirms must restore Consideration.** — It is a rule that money voluntarily paid by a minor under a contract from which he has derived no benefit may be recovered back upon his disaffirmance of the contract.[7] An infant, upon reaching majority, who chooses to disaffirm a sale of his real estate not made in accordance with law, may do so without first refunding, or offering to refund, the purchase-money.[8] But the principle is firmly established by the

[1] Bigelow *v.* Grannis, 2 Hill, 120; Goodsell *v.* Myers, 3 Wend. 479.

[2] Mayer *v.* McLure, 36 Miss. 389.

[3] Stern *v.* Freeman, 4 Met. (Ky). 309.

[4] Hoit *v.* Underhill, 10 N. H. 220. And see Tate *v.* Tate, 1 Dev. & Bat. 22.

[5] Morse *v.* Wheeler, 4 Allen, 570; Met. Contr. 59; Ring *v.* Jamison, 66 Mo. 124.

[6] Harmer *v.* Killing, 5 Esp. 103; Hinely *v.* Margaritz, 3 Barr, 428. See Curtin *v.* Patton, 11 S. & R. 305; Reed *v.* Boshears, 4 Sneed, 118; Norris *v.* Vance, 3 Rich. 164.

[7] Shurtleff *v.* Millard, 12 R. I. 272, applies this doctrine (and without restriction as to auctioneer's loss) to the deposit money, paid by an infant at an auction purchase, where he repudiated before completing the purchase.

[8] Pitcher *v.* Laycock, 7 Ind. 398; Cresinger *v.* Welch, 15 Ohio, 156; Miles *v.* Lingerman, 24 Ind. 385; Bedinger *v.* Wharton, 27 Gratt. 857; Green *v.* Green, 69 N. Y. 553. But see Stuart *v.* Baker, 17 Tex. 417.

courts that he cannot on attaining full age hold to an exchange or purchase, made by him in infancy, and its advantages, and thus affirm that, while pleading his infancy to avoid the payment of the purchase-money.[1] There is some conflict in this class of cases, however, at the present day; the effort being on the one hand to hold the infant to common honesty, and on the other, not to deprive him of the legal right of election which the policy of the law accords to all who have been under a legal disability, because of possible improvidence on his part while irresponsible. According to the better opinion now current, it is only when an infant on disaffirming his contract at majority still has the consideration, that he can be compelled to return it as the condition of disaffirmance; restitution in full not being a prerequisite, but restitution of the advantages as they still remain to him and capable of being restored.[2] Where an infant has the privilege of repudiating during infancy, a similar rule applies as to restoring consideration.[3]

Hence an infant cannot damage property he has received, and then demand the full price on offering to restore it.[4] Nor recover partnership property after rescinding the partner-

[1] Kline *v.* Beall, 6 Conn. 494; Bailey *v.* Barnberger, 11 B. Monr. 113; Strain *v.* Wright, 7 Ga. 568; Hillyer *v.* Bennett, 3 Edw. Ch. 222; Lowry *v.* Drake, 1 Dana, 46; Kitchen *v.* Lee, 11 Paige, 107; Tipton *v.* Tipton, 3 Jones, 552; Womack *v.* Womack, 8 Tex. 397; Smith *v.* Evans, 5 Humph. 70; Manning *v.* Johnson, 26 Ala. 446; Wilie *v.* Brooks, 45 Miss. 542; Kerr *v.* Bell, 44 Mo. 120.

[2] Chandler *v.* Simmons, 97 Mass. 508; Green *v.* Green, 69 N. Y. 553, and cases cited; Dill *v.* Bowen, 54 Ind. 204; Shurtleff *v.* Millard, 12 R. I. 272. Cf. Badger *v.* Phinney, 15 Mass. 359; Bartholemew *v.* Finnemore, 17 Barb. 428.

[3] Corey *v.* Burton, 32 Mich. 30, the case of a chattel mortgage; where the infant was allowed to replevy the chattels without restoring the consideration. But an infant purchasing chattels and giving a purchase-money mortgage for the price cannot disaffirm the mortgage and at the same time keep the chattels as if by clear title. Curtiss *v.* McDougal, 26 Ohio St. 66; Knaggs *v.* Green, 48 Wis. 601; Carpenter *v.* Carpenter, 45 Ind. 142; White *v.* Branch, 51 Ind. 210, — seem to absolve the infant from restoring property received in exchange. But, *semble*, if he still holds the exchanged property he ought, on correct principle, to restore or offer to restore it, when disaffirming the transaction. In many cases, to maintain an action based upon his avoidance of his contract, an infant should first give notice of his election to avoid or make a demand. Betts *v.* Carroll, 6 App. 518. See Stout *v.* Merrill, 35 Iowa, 47; Henry *v.* Root, 33 N. Y. 526.

[4] Carr *v.* Clough, 6 Fost. 280; Bartholemew *v.* Finnemore, 17 Barb. 428.

ship agreement, so as to prejudice liabilities of the firm which are outstanding;[1] nor rescind the partnership agreement and then demand benefits inconsistent with it.[2] If the former vendee be sued for use and occupation of land, it is held that he may recoup for valuable improvements; and equity favors a fair adjustment of rents, damages, and improvements.[3] The plea of false warranty may sometimes be set up against the infant's attempt by affirmance to enforce a hard bargain.[4] To multiply these illustrations is unnecessary; the cardinal principle which runs through them all is that, with due reservation of the infant's privilege, substantial justice should be done, if possible, between the two parties to a contract, and things placed *in statu quo* when the contract is rescinded; for courts are very reluctant to allow the infant to use his privilege as a means of defrauding others.

§ 447. **Ratification, &c., as to Infant Married Woman.** — Since a married woman conveys her lands by force of statute provisions, perplexing questions may arise as to the effect of a conveyance executed in conformity with late acts, yet ineffectual because of her infancy.[5] It would appear from some late American cases, that the wife still continuing covert after becoming of age, acts which might constitute ratification in ordinary cases may not always be set up against her.[6] But a married woman is sometimes estopped by her own acts; as in a case where her equitable interest in land was sold while

[1] Furlong *v.* Bartlett, 21 Pick. 401; Sadler *v.* Robinson, 2 Stew. 520; Kinnen *v.* Maxwell, 66 N. C. 45.

[2] Page *v.* Morse, 128 Mass. 99; Dunton *v.* Brown, 31 Mich. 82. So, too, as to his contract to perform service, *supra*, § 443.

[3] Weaver *v.* Jones, 24 Ala. 420; Petty *v.* Roberts, 7 Bush, 410. If one receives rents when an infant, he cannot demand them over again on attaining majority. Parker *v.* Elder, 11 Humph. 546.

[4] Morrill *v.* Aden, 19 Vt. 505. And see Heath *v.* West, 8 Fost. 101; Shipman *v.* Horton, 17 Conn. 481; Edgarton *v.* Wolf, 6 Gray, 453.

[5] Harbman *v.* Kendall, 4 Ind. 403.

[6] Matherson *v.* Davis, 2 Cold. 443; Miles *v.* Lingerman, 24 Ind. 385. The equity doctrine, to argue from the case of marriage settlements, appears to be that the wife may by acts give validity to such deeds, after attaining full age and notwithstanding her coverture. See *supra*, § 399. Disaffirmance soon after attaining majority was permitted in Scranton *v.* Stewart, 52 Ind. 69, 92. But a reasonable time after discoverture is allowed an infant wife, as cases now decide the point, though length of time may have intervened. See Schoul. Hus. & Wife, § 178; Sims *v.* Everhardt, 102 U. S. Supr. 300; *supra*, Part II. c. 6. Infant husband's conveyance voidable. 4 Heisk. 268.

she was a minor, together with the interests of adult parties, and she received her share of the proceeds some years after attaining majority.[1]

§ 448. **Rules; How far Chancery may elect for the Infant.** — By a well-known rule of equity, the proceeds of lands sold during minority retain the character of real estate, and where the personal estate becomes land its original character is likewise retained. And such property remains real or personal still, even after the infant attains majority, so long as there is no act or intent on his part to change its character;[2] but the character ceases when he attains majority, and obtains possession of the proceeds.[3]

A court of chancery, however, as the protector of the young, has an extensive jurisdiction of matters affecting an infant's property rights, and may, upon a full hearing, the infant himself being duly summoned and his rights duly represented, enter a decree, which, if procured without fraud or undue injury, will be binding. Of this jurisdiction we have already treated,[4] as also of statutes authorizing sales of an infant's real estate.[5] Infants must be parties to bills in equity, as, for instance, in affecting their title to real estate; and making their guardians parties is not sufficient, as it is generally ruled, without service of process upon the infant himself or the usual publication of notice.[6]

But the practical result must be, wherever chancery jurisdiction is broadly upheld, that the court in many instances, the infant being duly a party to the proceedings, elects for

[1] Anderson *v.* Mather, 44 N. Y. 249. And see Schmitheimer *v.* Eiseman, 7 Bush, 298.

[2] Foreman *v.* Foreman, 7 Barb. 215.

[3] Forman *v.* Marsh, 1 Kern. 544. Upon the death of the infant after such conversion the inheritance or distribution is according to the original character of the property. See Paul *v.* York, 1 Tenn. Ch. 547.

[4] Part IV. cs. 6, 7. But as to "allowing the infant his day" on reaching majority, see next c. Jurisdiction of the court over an infant ward is not taken away because the infant is insane. *In re* Edwards, L.R. 10 Ch. D. 605.

[5] *Ib.*; Chappell *v.* Doe, 49 Ala. 153.

[6] Tucker *v.* Bean, 65 Me. 352; Rowland *v.* Jones, 62 Ala. 322; Cook *v.* Rogers, 64 Ala. 406; Bonnell *v.* Holt, 89 Ill. 71; Carver *v.* Carver, 64 Ind. 195. But see Burrus *v.* Burrus, 56 Miss. 92; Scott *v.* Porter, 2 Lea, 224. And as to cancelling a purely personal contract this rule is all the more imperative. Insurance Co. *v.* Bangs, 103 U. S. Supr. 435. As to joining a guardian, see next c.

him.[1] The infant's own affirmance of the decree in chancery or under statute, as by accepting and retaining the benefits, delaying procedure to reopen the matter for alleged fraud or other infirmity, is of course a double confirmation.[2]

CHAPTER VI.

ACTIONS BY AND AGAINST INFANTS.

§ 449. **Actions at Law by Infants; Suit or Defence by Next Friend or Guardian.** — It is a fundamental principle that the rights of property shall vest in infants, notwithstanding their tender years; and incidentally thereto they have the right of action. Yet, it is clear that if the infant be unfit to make a contract he is unfit to sue on his own behalf. Hence is the rule that while process is sued out in the infant's own name, it is in his name by another; that is to say, some person of full age must conduct the suit for him. The same principle applies to all civil actions, whether founded on a contract or not.

At common law, infants could neither sue nor defend, except by guardian. They were authorized, by Stat. Westm. 1, to sue by *prochein ami* (or next friend) against the guardian in chivalry who had alienated any portion of the infant's inheritance.[3] Stat. Westm. 2, c. 15, extended this privilege

[1] Chancery may authorize leases for the enhancement of the real estate of infants if manifestly for their interests. Talbot *v.* Provine, 7 Baxt. 502. As to partition sale held binding, see Cocks *v.* Simmons, 57 Miss. 183; Scott *v.* Porter, 2 Lea, 224. As to decree enforcing a vendor's lien, see Cocks *v.* Simmons, 57 Miss. 183. As to sale for maintenance or better investment, see Sharp *v.* Findley, 59 Ga. 722; *supra*, Part IV. cs. 6, 7. Chancery may compromise a claim in which infants are interested, even against next friend or guardian *ad litem*. *In re* Birchall, 16 Ch. D. 41. Or exercise discretion as to selling either realty or personalty, or both. Jones *v.* Sharp, 9 Heisk. 660. And see Knotts *v.* Stearns, 91 U. S. Supr. 638. Decree sustained, notwithstanding the birth of a posthumous child not considered when the sale was ordered. *Ib.* See also Goodman *v.* Winter, 64 Ala. 410.

[2] Walker *v.* Mulvean, 76 Ill. 18; Corwin *v.* Shoup, 76 Ill. 246. See further, as to the binding effect of decrees and judgments, next c.

[3] Macphers. Inf. 13, 352.

to all other cases where they could not sue formally. Lord Coke lays down that, since these statutes, the infant shall sue by *prochein ami* and defend by guardian.[1] And Fitzherbert is to the same effect.[2] But Mr. Hargrave thinks it probable that Fitzherbert and Lord Coke did not mean to exclude the election of suing either by *prochein ami* or by guardian.[3] And whether they did or not, guardianship at the present day, so unlike guardianship as they understood it, justifies the modern practice; which is to appoint a special person as *prochein ami* only in case of necessity, where an infant is to sue his guardian, or the guardian will not sue for him, or it is improper that the guardian should be the *prochein ami*. In other cases, the rule is to sue by guardian or *prochein ami*.[4] But an infant may sue by his next friend though he have a guardian, if the guardian does not dissent.[5] And in some States the choice allowed the infant is still more liberal.[6] Not unfrequently, too, the next friend who brought the suit is removed and another appointed, on the ground that it is for the infant's benefit.[7]

An infant cannot prosecute an action either in person or by attorney. This is well settled.[8] But advantage must be taken by plea in abatement of the infant's suing by attorney, or by application to a judge, or the court, for it is not error after judgment either on verdict or by default.[9] The same rules are frequently applied to a parent who sues on behalf of minor children, but not as guardian or next friend. Where

[1] 2 Inst. 261, 390; Co. Litt. 135 *b*; 3 Robinson's Pract. 229.

[2] F. N. B. [27] H.

[3] Harg. *n.* Co. Litt. 135 *b*.

[4] Claridge *v.* Crawford, 1 Dowl. & Ry. 13; 3 Robinson's Pract. 230; Younge *v.* Younge, Cro. Car. 86; Goodwin *v.* Moore, Cro. Car. 161; Apthorp *v.* Backus, Kirby, 407; M'Giffin *v.* Stout, Coxe, 92; Blackman *v.* Davis, 42 Ala. 184.

[5] Thomas *v.* Dike, 11 Vt. 273; Robson *v.* Osborn, 13 Tex. 298.

[6] Hooks *v.* Smith, 18 Ala. 338.

[7] Barwick *v.* Rackley, 45 Ala. 215; Martin *v.* Weyman, 26 Tex. 460; Mills *v.* Humes, 22 Md. 316. As where the next friend refuses to appeal. Dupuy *v.* Welsford, 28 W. R. 762.

[8] Cro. Eliz. 424; Cro. Jac. 5; 1 Co. Litt. 135 *b*, Harg. *n.*, 220; Miles *v.* Boyden, 3 Pick. 213; Clark *v.* Turner, 1 Root, 200; Mockey *v.* Grey, 2 Johns. 192; Timmons *v.* Timmons, 6 Ind. 8; Nicholson *v.* Wilborn, 13 Ga. 467.

[9] 2 Saund. Pleading, 207; Bird *v.* Pegg, 5 B. & Ald. 418; Finley *v.* Jowle, 13 East, 6; Apthorp *v.* Backus, Kirby, 407. But as to the infant himself, see Bird *v.* Pegg; Jones *v.* Steele, 36 Mo. 324.

infancy of the plaintiff is pleaded in abatement to a suit brought by a minor in his own name without any guardian or next friend, the court may allow the infant to amend by inserting in his writ that he sues by A., his next friend.[1] Nor does this rule deprive the infant of the professional services of an attorney; it relates to the parties to the suit.[2]

§ 450. **Action at Law by Infants; The Next Friend.** — Generally speaking, when an action is brought by an infant, he sues in his own name by a certain person as next friend. A *prochein ami*, commencing his authority with the writ and declaration, can only maintain the suit for such causes of action as may be prosecuted without special demand; as for personal injuries done to the infant, or for sums of money where the writ itself is considered as the demand.[3] In England, it was once considered that the special admission of a guardian for an infant to appear in one case would serve for others.[4] But the modern rule is that the special admission of *prochein ami* or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action specified.[5] Sometimes there will be an advantage in suing by guardian if this can legally be done.[6]

The guardian, like the *prochein ami*, is, in English practice, appointed by the court before the plaintiff can proceed in the action, and no legal right of parentage or of guardianship will enable any one to act for the infant without such appointment.[7] But where the infant's father, being a necessary witness, could not properly be *prochein ami* in a certain suit, the court, on motion, appointed a friend of the family with the father's concurrence.[8] And the father's natural right to represent his child as next friend is to be respected.[9] No authority from the infant to the guardian or *prochein ami* to

[1] Blood *v.* Harrington, 8 Pick. 552.
[2] People *v.* New York, 11 Wend. 164.
[3] Miles *v.* Boyden, 3 Pick. 219.
[4] Archer *v.* Frowde, 1 Stra. 304.
[5] 2 Saund. Plead. 207; Macphers. Inf. 353.
[6] 3 Robinson's Pract. 229.
[7] Macphers. Inf. 353.
[8] Claridge *v.* Crawford, 1 Dowl. & Ry. 13.
[9] Woolf *v.* Pemberton, 6 Ch. D. 19.

sue is necessary, though the infant be on the very eve of majority; but it is intimated that the court might interfere if fraud was shown.[1] As the *prochein ami* is an officer of the court, if the infant wishes him removed he must apply to the court for that purpose, and an entry of the change should be made of record.[2] But on the plaintiff coming of age, he may, it seems, remove the *prochein ami* of his own authority, and appear thereafter by his own attorney.[3]

But while, in theory, the *prochein ami* is still legally appointed by the court, such formalities are now, in practice, very generally waived. In Connecticut, Massachusetts, Virginia, and other States, no entry of record is requisite admitting a person to sue as guardian or next friend, the recital in the writ and count being deemed sufficient evidence of admission unless seasonably challenged by the opposite party, when the order may be supplied.[4] In New York, on the other hand, a *prochein ami* must be appointed for the infant plaintiff before process is sued out; and such is the practice in some other parts of this country.[5] In some States it is deemed proper to prove infancy, and hence the right to sue by next friend.[6]

So, too, in this country, more deference seems to be shown to the infant's wishes than in England. Thus, in Massachusetts, the court, on the personal petition of a minor twenty years of age, withdrew the authority of the *prochein ami*, and ordered all further proceedings in the suit postponed until the minor should attain full years.[7] In the choice of a guardian and *prochein ami*, a minor above fourteen has much latitude of discretion; and when he attains full age he may

[1] Morgan *v.* Thorne, 9 Dowl. 228. And see Barwick *v.* Rackley, 45 Ala. 215.

[2] Davies *v.* Locket, 4 Taunt. 765; Morgan *v.* Thorne, *supra*.

[3] See Bac. Abr. Infant, K. 2; Patton *v.* Furthmier, 16 Kan. 29.

[4] See Guild *v.* Cranston, 8 Cush. 506; Boynton *v.* Clay, 58 Me. 236, Burwell *v.* Corbin, 1 Rand. 151; 3 Robinson's Pract. 230; Trask *v.* Stone, 7 Mass. 241; Judson *v.* Blanchard, 3 Conn. 579; Klaus *v.* State, 54 Miss. 644. And see Stumps *v.* Kelley, 22 Ill. 140.

[5] Wilder *v.* Ember, 12 Wend. 191; Haines *v.* Oatman, 2 Doug. 430; Grantman *v.* Thrall, 44 Barb. 173.

[6] Byers *v.* Des Moines, &c. R. R. Co., 21 Iowa, 54.

[7] Guild *v.* Cranston, 8 Cush. 506.

enter the fact upon record, and without further formality proceed to conduct the suit for himself.[1]

Where an infant has brought an action by his next friend, and has recovered damages which have been received by the attorney, the money is the money of the infant, and he may sue the attorney for it.[2]

A *prochein ami* is liable for costs, and the remedy is against him for attachment, which should be absolute in the first instance.[3] This is the English practice. It would appear that execution cannot issue against the infant himself; and this from the very circumstance that the next friend is, in theory, one who comes forward to assume all such liabilities.[4] But in conformity with statutes in Massachusetts, it is held that a *prochein ami*, as such, is not liable for costs;[5] nor does he seem to be always strictly considered in our courts a party to the suit;[6] and the infant plaintiff is made liable for his own costs.[7]

§ 451. **Action at Law against Infant; the Guardian ad Litem.** An infant can appear and defend in civil suits by guardian only, and not by attorney, or in person.[8] The process is the same against an infant as in ordinary cases; but he needs some one to conduct his defence, and hence every court, wherein an infant is sued, has power to appoint a guardian *ad litem* for the special purposes of the suit, since otherwise he might be without assistance.[9]

[1] Clark *v.* Watson, 2 Ind. 399; Shuttlesworth *v.* Hughey, 6 Rich. 329.

[2] Collins *v.* Brook, 4 Hurl. & Nor. 276. And see Smith *v.* Redus, 9 Ala. 99.

[3] Newton *v.* London, Brighton, &c. R. R. Co., 7 Dow. & L. 328 (1849); Dow *v.* Clark, 2 Dowl. 302. See Price *v.* Duggan, 4 Man. & Gr. 225.

[4] *Ib.*; Stephenson *v.* Stephenson, 3 Hey. 123; Perryman *v.* Burgster, 6 Port. (Ala.) 199; Sproule *v.* Botts, 5 J. J. Marsh. 162. But see Proudfoot *v.* Poile, 3 Dow. & L. 524; Macphers. Inf. 356, 357, and cases cited. As to practice under New York Code, see Linner *v.* Crouse, 61 Barb. 289. As to the infant's own testimony of age in such suits, see Hill *v.* Eldridge, 126 Mass. 234.

[5] Crandall *v.* Slaid, 11 Met. 288.

[6] Brown *v.* Hull, 16 Vt. 673.

[7] Howett *v.* Alexander, 1 Dev. 431; Smith *v.* Floyd, 1 Pick. 275. Cf. statutes of other States, Kleffel *v.* Bullock, 8 Neb. 336.

[8] Co. Litt. 88 *b*, *n.* 16, 135 *b*; 2 Stra. 784; Macphers. Inf. 358; Alderman *v.* Tirrell, 8 Johns. 418; Knapp *v.* Crosby, 1 Mass. 479; Miles *v.* Boyden, 3 Pick. 213; Bedell *v.* Lewis, 4 J. J. Marsh. 562; Starbird *v.* Moore, 21 Vt. 529.

[9] Bac. Abr. Guardian, B. 4.

A guardian *ad litem* is one appointed for the infant to defend in the particular action brought against him, and is therefore to be distinguished from guardians of the person and estate.[1] If there be a general chancery, probate, or testamentary guardian already appointed, it is his place to defend the infant from all suits, so long as his authority over the infant's property continues and his interest is not adverse in the suit; this being, however, a matter usually regulated in this country by statute.[2] This guardian ought to be a person with no interests to regard except those of the infant defendant.[3]

What has been observed of the appointment of *prochein ami* may be said, in general, of that of the guardian *ad litem*. The two correspond, and the principles of law applicable to the one are in general to be applied to the other.[4] In a criminal case no guardian *ad litem* is appointed. But in a civil case, proceedings against an infant are liable to be reversed and set aside for irregularity, where no guardian *ad litem* has been appointed for him, unless, perhaps, his regular guardian has appeared in his defence; and process must, besides, have been first regularly served upon the infant; though in this latter respect the rule of the several States is not uniform.[5] Irregularities of procedure or delay in the appointment are often cured by the judgment; and lapse of time and laches on the part of an infant after reaching majority may leave him altogether without an opportunity to set the judgment aside,

[1] Larkin *v.* Mann, 2 Paige, 27; Roberts *v.* Stanton, 2 Munf. 129; Bac. Abr. Guardian, *supra*, cases cited by Bouvier.

[2] See Hughes *v.* Seller, 34 Ind. 337.

[3] Hence the plaintiff's husband should not be appointed. Bicknell *v.* Bicknell, 72 N. C. 127.

[4] See Macphers. Inf. 358.

[5] See Abdil *v.* Abdil, 26 Ind. 287; Jarman *v.* Lucas, 15 C. B. N. S. 474; Frierson *v.* Travis, 39 Ala. 150. In some States it is required by statute that process shall be served upon the infant defendant personally, also upon his father, mother, or guardian. Ingersoll *v.* Ingersoll, 42 Miss. 155; Irwin *v.* Irwin, 57 Ala. 614; Helms *v.* Chadbourne, 45 Wis. 60. A judgment rendered against a minor without the appointment of a guardian *ad litem* is not void, but rather voidable. Walkenhorst *v.* Lewis, 24 Kan. 420. Some local statutes provide for the infant's modification of a judgment against him within a year after arriving at age. Richards *v.* Richards, 10 Bush, 617. But the judgment is *prima facie* correct, and errors must be prejudicial to the infant's interest in order to be thus availed of. Richards *v.* Richards, 10 Bush, 617.

especially if no prejudice has resulted, as in the case of his voidable transactions.[1]

The writ and declaration in actions at law against infants are to be made out as in ordinary cases. In English practice, where the defendant neglects to appear, or appears otherwise than by guardian, the plaintiff may apply for and obtain a summons, calling on him to appear by guardian within a given time; otherwise the plaintiff may be at liberty to proceed as in other cases, having had a nominal guardian assigned to the infant.[2] A like rule prevails in New York and other States.[3] Courts will go so far to protect an infant as to see that process is properly served, a guardian *ad litem* appointed for him, and the formal answer filed.[4]

Infancy may be specially pleaded in bar.[5] The plaintiff replies either that the defendant was of age or that the goods were necessaries, or that he confirmed the contract when he came of age. If there be several defendants, the party who is a minor should plead his infancy separately. Infancy is an issuable plea; and it may be pleaded with other pleas without leave of court.[6] Where there are several issues, one of which is upon the plea of infancy, that being found for the infant, the whole case is disposed of.[7] In New York, infancy may be given in evidence under the general issue.[8]

An infant defendant is liable to costs in the same manner as any other defendant, notwithstanding he has a guardian.[9] Macpherson says that the guardian of an infant defendant is subject to the same liability for costs as the *prochein ami*, or the guardian of an infant plaintiff.[10] No authority is given for

[1] See Townsend *v.* Cox, 45 Mo. 401; Barnard *v.* Heydrick, 49 Barb. 62; McMurray *v.* McMurray, 60 Barb. 117; Wickersham *v.* Timmons, 49 Iowa, 267; Maples *v.* Maples, 3 Houst. 458.

[2] See Macphers. Inf. 359.

[3] Van Deusen *v.* Brower, 6 Cow. 50; Judson *v.* Storer, 2 South. 544; Clarke *v.* Gilmanton, 12 N. H. 515.

[4] Alexander *v.* Frary, 9 Ind. 481.

[5] Clemson *v.* Bush, 3 Binn. 413; Hillegass *v.* Hillegass, 5 Barr, 97.

[6] 15 & 16 Vict. c. 76, § 84. See Delafield *v.* Tanner, 5 Taunt. 856; Dublin & Wicklow R. R. Co. *v.* Black, 8 Exch. 181.

[7] Rohrer *v.* Morningstar, 18 Ohio, 579.

[8] Wailing *v.* Toll, 9 Johns. 141.

[9] Anderson *v.* Warde, Dyer, 104; Gardiner *v.* Holt, Stra. 1217.

[10] Macphers. Inf. 361.

this statement, and it seems that the guardian of an infant defendant is not liable.[1]

If an infant comes of age pending the suit, he can assert his rights at once for himself, and if he does not he cannot generally complain of the acts of his guardian *ad litem*. Where a person is of age and *sui juris* it is error to appoint a guardian *ad litem*.[2]

§ 452. **Chancery Proceedings by or against Infants; Corresponding Rule.** — The same leading principles noticeable in suits at law are to be recognized in equity proceedings by or against infants; and the doctrines of next friend and guardian *ad litem* receive ample discussion in the chancery courts.[3]

Among the miscellaneous matters of chancery practice relating to infants may be mentioned proceedings in partition, orders for maintenance and education, the management of trust funds by guardians and other trustees, and the award of custody. These subjects have already been incidentally considered in the course of this treatise. And we need only add that, in the appointment of guardians *ad litem*, courts of chancery will exercise a liberal discretion; that in all proceedings of this character, the appointment of a guardian *ad litem* to appear in behalf of infants interested in the proceedings is regarded as proper and even necessary, when they have no general guardian or the general guardian has an adverse interest; that personal service upon the infants, besides, is usually requisite; and that a decree rendered without observance of such formalities may be reversed for error.[4] It is the rule in many States, as it was the old practice in chancery, to allow an infant his day, after he attains majority, to set aside a decree against him; thus, in effect, rendering

[1] See Perryman *v.* Burgster, 6 Port. (Ala.) 199. Such guardian should at all events be reimbursed all reasonable charges incurred in the case. Smith *v.* Smith, 69 Ill. 308.

[2] Mitchell *v.* Berry, 1 Met. (Ky.) 602. And see Marshall *v.* Wing, 50 Me. 62; Stupp *v.* Holmes, 48 Mo. 89; Bursen *v.* Goodspeed, 60 Ill. 277; Patton *v.* Furthmier, 16 Kan. 29.

[3] See 1 Daniell Ch. Pl. 3d Am. ed. 65 *et seq.*; *ib.* 150 *et seq.*, where the English and American authorities are very fully cited.

[4] *Ib.* And see Rhett *v.* Martin, 43 Ala. 86; Girty *v.* Logan, 6 Bush, 8; Rhoads *v.* Rhoads, 43 Ill. 239; Swain *v.* Fidelity Ins. Co., 54 Penn. St. 455; Ivey *v.* Ingram, 4 Cold. 129.

such decrees in chancery voidable rather than binding, so far as he is concerned, and treating him more than ever upon the footing of a privileged person;[1] for it is not too much to say that at all times and under all circumstances infants are especial favorites of our law.

§ 453. **Binding Effect of Decree or Judgment, upon the Infant.** — An infant defendant is as much bound by a decree in equity, rendered upon due jurisdiction and fairly,— as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, and who has regularly appeared by a guardian *ad litem* and has been served with process, he will not be permitted to dispute it unless upon the same grounds as an adult might have disputed it; such

[1] Simpson *v.* Alexander, 6 Cold. 619; Kuchenbeiser *v.* Beckert, 41 Ill. 173; 1 Daniell Ch. Pl. 3d Am. ed. 71, 167. Rule now abrogated in some States. Phillips *v.* Dusenberry, 15 N. Y. Supr. 348. It does not apply to an infant trustee. Walsh *v.* Walsh, 116 Mass. 377. And see O'Rorke *v.* Bolinbroke, 2 App. Cas. 814.

Concerning the appointment, the court's discretion is favored as in other interlocutory proceedings. Walker *v.* Hull, 35 Mich. 488. Giving security for costs will not obviate the necessity of suing in the name of next friend or guardian. Sutton *v.* Nichols, 20 Kan. 43. A fund in chancery should not be given up without securing the legal costs, &c., of the guardian *ad litem* or his solicitor. Sheahan *v.* Circuit Judge, 42 Mich. 69. As to infant married woman's guardian *ad litem* or next friend, see *Ex parte* Post, 47 Ind. 142. General guardians do not represent their wards in foreclosure proceedings, but a guardian *ad litem* is proper. Sheahan *v.* Circuit Judge, 42 Mich. 69. Where the infant's probate guardian has an adverse interest in the suit, there should be a guardian *ad litem* appointed. Stinson *v.* Pickering, 70 Me. 273. Though service on the infant is the regular rule (*supra*, § 448), it is held in some States that a regular guardian may defend, and may waive the service of process, even where the minor's realty is involved. Scott *v.* Porter, 2 Lea, 224; Walker *v.* Veno, 6 Rich. 459. As to infant's acceptance of service see Wheeler *v.* Ahenbeak, 54 Tex. 535.

A guardian *ad litem* cannot admit away the substantial rights of infants: his passiveness will not be construed into a waiver; nor will a bill in equity be taken as confessed against an infant. Lane *v.* Hardwicke, 9 Beav. 148; Tucker *v.* Bean, 65 Me. 352; Mills *v.* Dennis, 3 Johns. Ch. 367; Turner *v.* Jenkins, 79 Ill. 228; Jones *v.* Jones, 56 Ala. 612.

An infant may by original bill impeach a decree in favor of his guardian and prejudicial to his own interests; nor, on general chancery rules, need he wait until attaining full age. Sledge *v.* Boone, 57 Miss. 222. A decree not appealed from is held binding upon an infant in the absence of fraud, whoever may have been his guardian *ad litem*, process having been duly served on the infant. McCrosky *v.* Parks, 13 S. C. 90; Cuyler *v.* Wayne, 64 Ga. 78. What has been decreed will be presumed rightly done. Whether guardian *ad litem* or *prochein ami* can submit an infant's interests to arbitration, see Tucker *v.* Dabbs, 12 Heisk. 18.

as fraud, collusion, or fundamental error.[1] As to the binding force of judgments at law, the rule does not seem to be equally strong.[2] But where a defendant in a suit is a minor at the time of service of summons, and the record shows that he becomes of full age before the judgment is taken, a court is disposed to uphold the judgment unless it can be impeached for fraud.[3] In some States, doubtless both judgments at law and decrees of equity now stand on the same conclusive footing, and the infant has not his opportunity to show cause as to either class on reaching majority, except on the grounds above stated.[4]

[1] 1 Dan. Ch. Practice, 205; Rivers *v.* Durr, 46 Ala. 418; Ralston *v.* Lahee, 8 Clarke (Iowa), 17; *In re* Livingston, 34 N. Y. 555, *supra*, § 448. And see, as to allowing the infant his day, § 542. But see Tibbs *v.* Allen, 27 Ill. 119; Driver *v.* Driver, 6 Ind. 286; Ashton *v.* Ashton, 35 Md. 496.

[2] *Supra*, § 407.

[3] Stupp *v.* Holmes, 48 Mo. 89. And see Blake *v.* Douglass, 27 Ind. 416.

[4] Phillips *v.* Dusenberry, 15 N. Y. Supr. 348; Bickel *v.* Erskine, 43 Iowa, 213. As to either guardian *ad litem* or *prochein ami*, he is not a party to an action in such sense that his relationship to the judge disqualifies the latter from sitting in the case. Sinclair *v.* Sinclair, 13 M. & W. 646; Bryant *v.* Livermore, 20 Minn. 313, 342, and cases cited.

A person of unsound mind allowed to prosecute ejectment in his own name. Rankin *v.* Warner, 2 Lea, 302. Generally the contracts of a lunatic's guardian bind himself personally, and not immediately the estate he represents (*supra*, Part IV. c. 6); but an action at law is as a rule maintainable against an adult lunatic to recover a debt due from him before he became insane, and this without the intervention of guardian *ad litem*. Hines *v.* Potts, 56 Miss. 346; Stigers *v.* Brent, 50 Md. 214. A person of unsound mind may file a bill in equity by next friend, either before or after an inquisition of lunacy, where there is no guardian or committee. Parsons *v.* Kinzer, 3 Lea, 342. But while this is the old rule, it is not universally sustained at the present day. Dorsheimer *v.* Roorback, 3 C. E. Green, 440; Beall *v.* Smith, L. R. 9 Ch. 85.

PART VI.

MASTER AND SERVANT.

CHAPTER I.

NATURE OF THE RELATION; HOW CREATED AND HOW TERMINATED.

§ 454. **Definition; this not strictly a Domestic Relation.** — A master is one who has legal authority over another; and the person over whom such authority may be rightfully exercised is his servant. The relation of master and servant pre-supposes two parties who stand on an unequal footing in their mutual dealings; yet not naturally so, as in other domestic relations, nor necessarily because the subordinate is wanting in either years or discretion. This relation is, in theory, hostile to the genius of free institutions. It bears the marks of social caste. Hence it may be pronounced as a relation of more general importance in ancient than in modern times, and better applicable at this day to English than American society.

Master and servant has, nevertheless, been uniformly regarded as one of the domestic relations. In lands where human slavery is lawfully recognized, it is pre-eminently so; and thus were its foundations deeply laid in the civil law. In the early days of the common law, it formed a distinct part of the English household jurisprudence; and in a state of society where landed proprietors are few and wealthy, where rank and titles are maintained with ostentatious dis-

play, where the humble born are taught to obey, rather than aspire, this must so continue. Not only cooks, butlers, and housemaids are thus brought within the scope of this relation, but farm-hands, plantation laborers, stewards, bailiffs, factors, family chaplains, and legal advisers.

Thus is explained what at first may seem an anomaly, that the common law, under the head of master and servant, discusses principles which, in this day, belong more justly to the relation of principal and agent; and that we constantly find an offensive term used in court to denote duties and obligations which rest upon the pure contract of hiring. Clerks, salaried officers, brokers, commission merchants, all are designated as servants; and our topic in this broad sense is not, if words mean anything, within the influence of the domestic law at all. Nor is it possible to extend the lines so as to include these persons without abandoning consistency of purpose, and yielding up the vital principle of legal classification.

Were the writer then untrammelled by authority, his treatment of this topic, as one of the domestic relations, would be confined to what are denominated at common law menial servants, so called from being *intra mœnia;* or rather to domestic servants, extending the definition to all such as are employed in and about a family in carrying on the household concerns, whether their occupations be within or without doors, so long as they constitute part of the family. In this restricted sense, the law of master and servant is manifestly of little importance to-day. But, as the reader may have perceived on perusal of the topic of guardian and ward, legal precision must sometimes be sacrificed to legal usage; and as terms have been carried in both instances beyond their original signification, for the sake of analogy, we are bound to follow a certain distance, even though it be into logical confusion.

How much the law of master and servant is understood to mean may be gathered from the books. Blackstone comprehends under this head slaves, menial servants, apprentices, hired laborers, and servants *pro tempore*, such as stewards,

factors, and bailiffs, and he thereupon proceeds to discuss principles applicable to all such classes alike.[1] Reeve carries the discussion still further, as to factors, brokers, attorneys, and agents generally.[2] Kent, writing for later readers, with a clearer appreciation of his limits, classifies into slaves, hired servants, and apprentices, and confines his discussion more carefully to what might subserve the wants of the domestic law; yet not with exactness.[3] None of these writers erred in their general views; the principles of the law had already spread out with the growth of society in such a manner that they were obliged to follow the authorities. For the same reason the present writer, keeping in view the natural boundaries of his subject, will nevertheless take a somewhat comprehensive and desultory range; thereby meeting better the practical wants of the lawyer, and satisfying a reasonable expectation.

§ 455. **Rule of Classification as to Master and Servant.** — Slavery, for obvious reasons, need no longer be treated as a branch of our law of master and servant. We come first, then, to hired servants, or servants proper; and as to these the contract between them and their masters arises upon the hiring; the servant being bound to render the service, and the master to pay the stipulated consideration.[4] The next class is that of apprentices: fairly distinguishable, as comprising such, usually minors, as are bound out under public statutes, and over whom, by reason of their tender years, and in accordance with the spirit of such statutes, the master stands somewhat in the stead of a parent. Yet apprentices might be bound out merely to learn a trade, and as part of the education furnished by their judicious parents; and Blackstone mentions that very large sums were sometimes given with them for their instruction at his day.[5] Thirdly, persons commonly known in popular speech as workmen or employees, who are brought within the principles of one or both of the two preceding classes, and to whom the relation of master and

[1] 1 Bl. Com. ch. 14.
[2] Reeve Dom. Rel. 339 *et seq.*
[3] 2 Kent Com. Lec. 32.
[4] 1 Bl. Com. 425; 2 Kent Com. 258.
[5] See 1 Bl. Com. 426; 2 Kent Com. 263, 264.

servant may well be said to apply. In this class are included day laborers, factory operatives, miners, colliers, and numerous others, of whom nothing more definite can be said than that they are hired to perform services of a somewhat unambitious character. If to these be added all other occupations to which the same rules are from time to time applied in the courts, it is gratifying to reflect that the servant is frequently the social equal, or even the superior, of his master. But let us invert the order, disregarding general service for the present. In other words, let us glance rapidly at the relation first of workmen and next of apprentices; then we can consider the relation of hired servants in its wider sense more at our leisure.

§ 456. **Relation of Master and Workman; Courts of Conciliation; Trade Unions, &c.** — *First.* The rights of workmen or employees furnish a fruitful topic for legislation. And so widely do the English and American systems differ in these and kindred matters, that judicial precedents may not always be safely interchanged between the two nations. Further is it to be remarked that apprentices and workmen are very generally affected by the same statutes.

Prior to 1824, English industrial legislation leaned decidedly in favor of the master. Trade monopolies, of which Sir Edward Coke complained so justly, were indeed greatly restricted in the time of James I.;[1] yet their influence was felt down to a much later period; and certain corporations and guilds enjoyed exclusive privileges, which obstructed almost entirely the enterprise of individuals. Attempts were made from time to time to better the condition of the working classes, and to regulate the payment of their wages; but while fines and imprisonment were the punishment of the employed, the employer suffered rarely for his own misconduct beyond rescission of the contract.[2] To exercise a trade in any town without having previously served an apprenticeship of seven years was a penal offence.[3] So, to entice or seduce artisans to settle abroad and communicate their knowledge, to engage in the

[1] 3 Inst. 181. See 4 Bl. Com. 159.

[2] See Acts 20 Geo. II. c. 19; 6 Geo. III. c. 25; Macdonald Handybook, 70, &c.; 1 Bl. Com. 426, 427.

[3] 4 Bl. Com. 160.

export of machinery, all this was criminal, and punished with severity, the object proposed by such legislation being to prevent the destruction of home manufactures.[1] An important act, passed in May, 1823, was calculated to ameliorate the condition of workmen, by enlarging the powers of magistrates on behalf of apprentices; yet English petty magistrates were always inclined to obsequiousness, and their tribunals had not the confidence of the working classes, as remains the fact to this day.

Public sentiment of later years, however, has undergone a great change, and class legislation has fallen into comparative disrepute. No principle so beneficial to workmen has been introduced as that of arbitration. This doctrine of arbitration appears distinctly set out in the act 5 Geo. IV. c. 96, of 1824, a consolidating statute which gets rid of former inequalities, and marks the latest era in English industrial legislation. Yet the arbitration provisions of this act are said not to have worked well in practice, partly, as a writer suggests, because of the requisite intervention of a justice of the peace, partly from its lack of simplicity.[2] But a very recent act establishes "equitable councils of conciliation" to adjust differences between masters and workmen, upon a plan much resembling the French courts of *Prud'hommes*.[3] The plan is, that masters and workmen shall each elect their own delegates to a board or council, which is empowered to fix upon the rate of wages between employer and employed, and otherwise adjust disputes peculiarly appertaining to such service.[4] And a still later act sets forth the details of such agreements quite fully, and further provides for the designation of arbitrators in case of a disagreement.[5]

[1] *Ib.*

[2] Macdonald Handybook, 137, — a small and convenient compendium published in 1868.

[3] 30 & 31 Vict. c. 105 (1867).

[4] This experiment had been tried in the English manufacturing districts for some years previous to the passage of the act, and with marked success. A celebrated strike at Nottingham, in 1860, led to its first practical application; and though there was then no statute countenancing such a court, manufacturers elsewhere were soon led to adopt the system from its manifest convenience. To introduce such a court into England is said to have been a favorite speculation of the late Lord Brougham. See Macdonald Handybook, 274.

[5] 35 & 36 Vict. August 6, 1872. The principle of arbitration in the matter

There is comparatively little legislation of this sort to be found in our States. Trade is less fettered in America than it was in England; and disputes between master and servant have been generally adjusted between themselves or by the ordinary legal methods. The fluctuation of society in America, the variety of pursuits always open to active competitors, the opportunities freely afforded for social elevation, together with the fact of a wider distribution of our manufacturing population than in England, contribute to the difference. The employee of to-day becomes the employer of to-morrow. Yet humane laws are frequently enacted, and still more frequently called for. In Connecticut, Pennsylvania, and other States, children are specially protected from laborious toil unsuited to their years, and the hours of work in the mills are reduced to a proper limit.[1] And young children are to be taught the necessary branches of a common education, notwithstanding their employment in manual labor.[2]

Trade associations are often formed in both countries to protect the rights of workmen in certain mechanical pursuits. But arbitrary and oppressive conduct on the part of such associations is not to be countenanced. Thus, where a trade association conspires to break down the business of a master mechanic, because he will not pay a sum demanded, by interfering with his employment of workmen, he may sue them for damages.[3]

§ 457. **Relation of Master and Apprentice.** — *Second.* The relation of apprentice was, in its original spirit and policy, as Kent has observed, calculated to give the apprentice a thorough trade education, and to advance the mechanic arts.[4]

of trade disputes was adopted in 1872 by master-builders and masons on a strike, upon the recommendation of a committee of the Social Science Association.

[1] See 2 Kent Com. 12th ed. 266, and notes referring to statutes of Pennsylvania, Maine, New Hampshire, Connecticut, and New Jersey.

[2] There are similar acts in England lately passed. See Factory Acts, 7 Vict. c. 15; 10 Vict. c. 29; 16 & 17 Vict. c. 104; 24 & 25 Vict. c. 117; 30 & 31 Vict. c. 103.

[3] Carew *v.* Rutherford, 106 Mass. 1; Walker *v.* Cronin, 107 Mass. 555. The members of such an association who uphold a strike may, in a strong case of oppression, be indicted for a conspiracy. Commonwealth *v.* Curren, 3 Pittsb. 143. And see *post*, c. 4.

[4] 2 Kent Com. 266.

To some extent, it has that significance still. The English apprentice system, beyond what has just been noticed of working-men generally, has, however, referred more especially to the poor or parish apprentices, who, under a late act, may be bound out to the sea service as well as a trade.[1] In many American States there appear to exist no provisions for binding out others than poor children and orphans. Again, in other States, as New York, Massachusetts, and Pennsylvania, the provisions are more general.[2] The principle of such statutes is to permit those having custody to assign to strangers a certain authority over their children, until the latter reach majority; and town authorities, or overseers of the poor, may, in many instances, supply the want of natural protectors and keep the young from vicious surroundings. But, inasmuch as the infant's own assent is now made essential to such instruments, so far as binding him beyond the age of discretion is concerned; inasmuch as courts do not hesitate to disregard them, if at all inequitable, or even perhaps if drawn up not in strict conformity to statute; while, according to our policy, the child's freedom to dispose of his own time in general when left to earn his living, is very favorably regarded; it must be said that apprenticeship by indenture is now thought less desirable than it was formerly. Public authorities may resort to it with advantage for securing good homes to the homeless; parents not equally so; the poor, however, may often thus secure a trade education for their children without cost to themselves. There can certainly be nothing unreasonable in permitting one of suitable discretion to make any fair contract of service, whether verbal or in writing, and the advantages may often constitute an adequate compensation for his labor. If he be very discreet he will not, however,

[1] 1 Bl. Com. 426, notes by Chitty and others. As to the Mississippi rule where a chancery court binds out, see Howry *v.* Callowey, 48 Miss. 587.

[2] See 2 Kent Com. 262, *passim*, 12th ed., and *n.* Jurisdiction for binding out in this country is given in many States to the judge of probate. Owen *v.* State, 48 Ala. 328; Spears *v.* Snell, 74 N. C. 210. Incorporated institutions, like a juvenile asylum, it is held, may thus be authorized by a legislature. People *v.* Juvenile Asylum, 2 Thomp. & C. 475. Overseers of poor, commissioners of charities, &c., have authority in some States. People *v.* Weissenbach, 60 N. Y. 385; Glidden *v.* Unity, 10 Fost. 104.

make a contract to last without possible modification for any great length of time.[1]

[1] There are many English and American decisions as to the mutual rights and duties of master and apprentice, most of which are of local or limited application. The English cases will be found in Macdonald Handybook, 76, 216. Prospective damages cannot be recovered by the master where the apprentice unlawfully quits the service. Lewis *v.* Peachey, 1 H & C. 518. To make the master liable on his covenant to teach a trade, it must appear that the apprentice was ready and willing to be taught. Raymond *v.* Minton, L. R. 1 Ex. 244. Such indentures are strictly construed and must be executed according to statute. St. Nicholas *v.* St. Bodolph, 12 C. B. N. S. 645. Questions relating to the conviction of apprentices or workmen for misconduct constantly arise under the English statutes; also as to the parish settlement of pauper apprentices. Macdonald, 76; *ib.* 218. See Boast *v.* Firth, L. R. 4 C. P. 1, as to actions for breach of indenture of apprenticeship. It is doubtful whether courts of equity in England would cancel indentures of apprenticeship except for fraud. Webb *v.* England, 29 Beav. 44. The master has his remedies against third persons for enticement, on the principles usually applicable to servants. Cox *v.* Muncey, 6 C. B. N. S. 375. And see Royce *v.* Charlton, 8 Q. B. D. 1.

In this country it would appear to be the rule that contracts of apprenticeship, not executed in strict accordance with statute, are invalid; or, rather, are voidable by the parties concerned. Maltby *v.* Harwood, 12 Barb. 473; Bolton *v.* Miller, 6 Ind. 262; Ballenger *v.* McLain, 54 Ga. 159. But see Brewer *v.* Harris, 5 Gratt. 285. And to the validity of the indentures the judge's assent may be necessary. Hunsucker *v.* Elmore, 54 Ind. 209. Yet the relation of master and servant may be inferred, notwithstanding, from the acts and conduct of the parties. Maltby *v.* Harwood, *supra;* Page *v.* Marsh, 36 N. H. 305. In many instances, the courts exercise a supervisory influence; and they will insist upon the provisions being reasonable; in some cases, requiring the insertion of fair covenants on the master's part, such as instruction of the apprentice in some particular trade; and they will even cancel indentures which are unsuitable in terms or were fraudulently procured. Owens *v.* Chaplain, 3 Jones, 323; Finch *v.* Gore, 2 Swan, 326; Bakers *v.* Winfrey, 15 B. Monr. 499; Lammoth *v.* Maulsby, 8 Md. 5; Bell *v.* Herrington, 3 Jones, 320; Hatcher *v.* Cutts, 42 Ga. 616; Mitchell *v.* McElvin, 45 Ga. 458. Both in this country and in England, the apprentice, on reaching full age, may abandon the contract; though the rule of avoidance is not expressed with uniformity. Drew *v.* Peckwell, 1 E. D. Smith, 408; Walker *v.* Chambers, 5 Harring. 311; Forsyth *v.* Hastings, 27 Vt. 646; Wray *v.* West, 15 L. T. N. S. 180, Q. B. It is held that overseers of the poor, in binding out paupers as apprentices, act as public officers and not as the agents of their towns. Glidden *v.* Unity, 10 Fost. 104. And see Bardwell *v.* Purrington, 107 Mass. 419. The government, by accepting the apprentice into military service, confers upon him the right to his own pay and bounty. Johnson *v.* Dodd, 56 N. Y. 76. The master's right of custody as against an unwilling apprentice, who wishes to return to his parents, appears in this country to be quite doubtful, though the indentures be well drawn; the wishes of the child being apparently regarded as paramount. People *v.* Pillow, 1 Sandf. Sup. 672. In several instances, where imperfect indentures had been terminated, the master was held not liable for the apprentice's services on a *quantum meruit*, their original engagement contemplating nothing of the kind. Maltby *v.* Harwood, 12 Barb. 473; Page *v.* Marsh, 36 N. H.

§ 458. **Strict Relation of Master and Servant; Contract of Hiring.** — *Third.* To come, then, to the strictly legal relation of master and servant. This contract arises purely upon the hiring. If the hiring be general, without any particular time

305; Hudson *v.* Worden, 39 Vt. 382. The assignment of apprenticeship is in some States pronounced void, the trust being personal; and in general it is voidable by the infant himself. Tucker *v.* Magee, 18 Ala. 99; Huffman *v.* Rout, 2 Met. (Ky.) 50; Allison *v.* Norwood, Busbee, 414; Commonwealth *v.* Van Lear, 1 S. & R. 248; Phelps *v.* Culver, 6 Vt. 430. Yet the infant's renewed assent may give force to it. See Williams *v* Finch, 2 Barb. 208; Nickerson *v.* Howard, 19 Johns. 113. In some States, and perhaps in all, infancy is a good plea to action of covenant on such indentures. McNight *v.* Hogg, 1 Const. 117. See Brock *v.* Parker, 5 Ind. 538. As to the construction and method of execution of such indentures, see also Whitmore *v.* Whitcomb, 43 Me. 458; McPeck *v.* Moore, 51 Vt. 269; Van Dorn *v.* Young, 13 Barb. 286; Glidden *v.* Unity, 10 Fost. 104; Wright *v.* Brown, 5 Md. 37. A child held under invalid indentures of apprenticeship may be discharged upon *habeas corpus*. Cannon *v.* Stuart, 3 Houst. 223; Commonwealth *v.* Atkinson, 8 Phil. 375. For enticement of an apprentice, or other injury interfering with the service, the master has the usual remedies against third persons; and sometimes the party enticing may be indicted. Holliday *v.* Gamble, 18 Ill. 35; Bardwell *v.* Purrington, 107 Mass. 419; Ames *v.* Union R., 117 Mass. 541; Doane *v.* Covel, 56 Me. 527; Hooks *v.* Perkins, Busbee, 21. Though this seems to be because of the relation of servant rather than apprentice. See c. 4, *infra*. And a father who executes such indenture is bound to exercise his paternal authority to aid in its enforcement. Van Dorn *v.* Young, 13 Barb. 286. A settlement between master and apprentice, made soon after the expiration of the term, will be viewed with great jealousy. McGunigal *v.* Mong, 5 Barr, 269. As a rule, except in cases of paupers, both the English and American statutes require that the infant shall execute the deed if fourteen, as well as his parents, and the policy of the law is against binding out one of discreet years, unless he is made a party to the instrument. See 2 Kent Com. 12th ed. 263, 264, and notes; Stats. Vermont, New York, Maine, &c. The infant's informal assent will not bind him. Commonwealth *v.* Moore, 1 Ashm. 123; Squire *v.* Whipple, 1 Vt. 69. But see Fisher *v.* Lunger, 4 Vroom, 100. It must be distinctly expressed in the indenture. Harper *v.* Gilbert, 5 Cush. 417. And where the court binds out, prudence requires that the infant should be present. Mitchell *v.* Mitchell, 67 N. C. 307. The mother's consent, too, as parent, where the father is dead, or incapacitated from giving consent, is favored in many States. People *v.* Gates, 43 N. Y. 40. And under our statutes a child may frequently be apprenticed to Shakers, as well as to any other master. People *v.* Gates, 43 N. Y. 40; Curtis *v.* Curtis, 5 Gray, 535 An apprentice's residence during minority would appear to be that of his master. Maddox *v.* State, 32 Ind. 111. A minor who performs service under invalid articles may recover therefor. Kerwin *v.* Myers, 71 Ind. 359. For his master's breach of indentures the apprentice may sue on reaching full age. Cann *v.* Williams, 3 Houst. 78. As to dismissal of an apprentice for misbehavior, &c, under the terms of the contract, see Westwick *v.* Theodor, L. R. 10 Q. B. D. 24.

limited, the old law construes it into a year's hiring.[1] But the equity of this rule extended only to such employment as the change of seasons affected; as where the servant lived with his master or worked at agriculture. By custom, moreover, such contracts have become determinable in the case of domestic servants, upon a month's notice, or, what is an equivalent, payment of a month's wages.[2] Laborers are hired frequently by the day, and to hire by the week is not unusual.[3] Yet, as to hiring in general, the rule still is that if master and servant engage without mentioning the time nor the frequency of payment, it is a general hiring, and in point of law a hiring for a year,[4] a rule however, founded in English rather than American usage. Custom modifies this principle, and the date and frequency of periodical payments are material circumstances in each case. The principle of yearly hiring is applicable to all contracts of hiring and service, whether written or unwritten, whether express or implied, and whatever the nature of the service; its modifications arise whenever the contract contains stipulations inconsistent with its application, or where, from some well-known custom upon the subject, the parties may be considered to have contracted with sole reference to such custom.[5] In this country, at least, if a contract for hiring is at so much per month, it will readily be presumed that the hiring was by the month, even if nothing was said about the term of service.[6] But the periodical payment is not conclusive as to the periodical hiring where the evidence shows an arrangement for a different period; there is no such precise rule here as in the relation of landlord and tenant.[7] In this country custom bears very strongly upon the interpretation of all contracts of service.[8]

The rule as to hiring does not apply to cases where there has been a service, but no contract of hiring and no circum-

[1] Co. Litt. 42; 1 Bl. Com. 425.

[2] Nowlan *v.* Ablett, 2 Cr., M. & R. 54; Fawcett *v.* Cash, 5 B. & Ad. 904; Fewings *v.* Tisdal, 1 Exch. 295.

[3] R. *v.* Pucklechurch, 5 East, 382.

[4] Fawcett *v.* Cash, 5 B. & Ad. 904. See Lilley *v.* Elwin, 11 Q. B. 742.

[5] Smith Mast. & Serv. 41, 42; Rex *v.* Worfield, 5 T. R. 506; Baxter *v.* Nurse, 1 Car & K. 10; Hathaway *v.* Bennett, 10 N. Y. 108.

[6] Beach *v.* Mullin, 5 Vroom, 343.

[7] Tatterson *v.* Suffolk Man. Co., 106 Mass. 56; Prentiss *v.* Ledyard, 28 Wis. 131.

[8] Lyon *v.* George, 44 Md. 295.

stances from which a contract can be inferred. And a contract of hiring cannot be presumed where the circumstances tend to rebut such a presumption; as where paupers have been taken to live with their relatives out of charity,[1] or where the agreement was for cohabitation and not for service.[2]

We find at the outset, then, a distinction made in practice between servants, menial or domestic, and other servants; which distinction is founded upon a custom of dissolving the relation, not at the end of a year, but at any time upon giving the servant a month's wages. An English writer says that no general rule can be laid down as to who do and who do not come within the category of menial servants; every case must stand upon its own circumstances.[3] But in a late case, where the subject was fully discussed, the disposition manifested was to extend the word "domestic" beyond the signification "menial;" and a family huntsman was brought within the above rule.[4] The reason is apparently that contracts for services which bring the parties into such close proximity and frequency of intercourse that they are valuable only when mutually agreeable and otherwise intolerably annoying, should be readily terminated at the option of either party.[5] A governess engaged at a yearly salary, though residing in the house,

[1] Rex *v.* Sow, 1 B. & Ald. 178; Smith Mast. & Serv. 42.

[2] Rex *v.* Northwingfield, 1 B. & Ad. 912. Where either party is at liberty to determine the service at any time without notice, the hiring cannot be considered a yearly contract. Smith Mast. & Serv. 43, 44, and cases cited; Rex *v.* Great Bowden, 9 B. & C. 249, and cases cited. Or if the hiring be expressly for less than a year; although done purposely to avoid the consequences of a yearly hiring. Rex *v.* Standon Massey, 10 East, 576; 2 Salk. 535; Rex *v.* Coggeshall, 6 M. & S. 264. Or if the agreement be to do work by the piece or job. Rex *v.* Woodhurst, 1 B. & Ald. 325. Or if certain portions of the year are specially excepted. Rex *v.* St. Helen's, 4 B. & Ad. 726. Or if the master has not entire control, and the servant is at liberty, when not engaged for his master, to work for others; though this rule is to be cautiously applied. Rex *v.* Killingholme, 10 B. & C. 802. See Reg. *v.* Ravenstonedale, 12 Ad. & El. 73. The same principle holds good where the hours of working are limited by contract. Reg. *v.* Preston, 4 Q. B. 597.

[3] Smith Mast. & Serv. 2d ed. 52.

[4] Nicoll *v.* Greaves, 17 C. B. N. S. 27. The dictionaries furnish little aid on this point.

[5] Per Erle, C. J., *ib.* See further, Nowlan *v.* Ablett, 2 Cr. M. & R. 54; Johnson *v.* Blenkensopp, 5 Jur. 807; Crocker *v.* Molyneux, 3 Car. & P. 470; *Ex parte* Walter, L. R. 15 Eq. 412; Stone *v.* Western Transportation Co., 38 N. Y. 240.

is, however, held not to be within the class of menial or domestic servants: regard being paid by the court to the dignity of her position.[1] But the head gardener is, though living not in the master's house, but in his own cottage in the domain.[2]

§ 459. **Contract of Hiring affected by Statute of Frauds.** — At the common law, a servant might be hired either by deed or by a parol contract, but when hired or retained by deed he could only be discharged by an equally formal instrument; when hired by parol he might be discharged by parol.[3] But since the enactment of the statute of frauds, contracts of hiring must be frequently expressed in writing, in order to be legally effectual. Under this statute, the contract of service may be verbally made and proved if it is capable of performance within a year; otherwise, it must be in writing. Hence, a verbal agreement to hire for a year, commencing at a future day, is insufficient.[4] In short, a contract for personal service which is not to go into operation for a year, or is to continue in force and hold the parties together for a longer period, must be in writing.[5] Yet it seems that a contract made on a certain day to serve for a year from the following day is not within the statute of frauds.[6]

§ 460. **Contract of Hiring; when in Restraint of Trade or Oppressive as to Length of Term.** — Restraint of trade sometimes enters as an element into agreements between master and servant. If professional men, manufacturers, or tradesmen take clerks, apprentices, or workmen into their employ, and require them to agree that they will not carry on a like profession, manufacture, or trade within certain limits, — this for the purpose of securing themselves against competition, — the contract, being in restraint of trade, is illegal and void.[7] The

[1] Todd *v.* Kerrich, 8 Exch. 151; 14 E. L. & Eq. 433.

[2] Nowlan *v.* Ablett, 2 Cr. M. & R. 54. Where one hires a man and his wife to "live in his family" and "work for him," this is a contract for their personal services. Jennings *v.* Lyons, 39 Wis. 553.

[3] Smith Mast. & Serv. 16; Dalt. Just. c. 58.

[4] Bracegirdle *v.* Heald, 1 B. & Ald. 722; Giraud *v.* Richmond, 2 C. B. 835.

[5] See 1 Smith Lead. Cas. 432, and American notes, where this subject is thoroughly examined.

[6] Cawthorn *v.* Cordrey, 32 L. J. N. S. C. P. 152.

[7] Com. Dig. "Trade," D 3; Mitchel *v.* Reynolds, 1 P. Wms. 181; s. c. 1 Smith Lead. Cas. 508, Am. ed. notes;

general rule is that, in order to render such a contract valid at law, the restraint must be (1), partial only; (2), upon an adequate, or, as the law now seems to stand, not a mere colorable restriction; (3), reasonable and not oppressive.[1] Even then equity would be loth to enforce it specifically if it be at all hard or even complex;[2] though in many cases it will do so.[3]

To the same general head as contracts in restraint of trade belong contracts by which the services of individuals are secured for a specified time, or for life, to a particular master. Contracts for life are not illegal at common law; but they are very strongly objectionable; and, in this country, it is doubtful whether they would ever be enforced, so contrary are they to the spirit of our institutions.[4] Yet some writers commend such contracts; and in England agreements whereby, in substance, workmen engaged to serve, for a term of seven years, certain persons or their firm, or again, at a certain scale of wages subject to determine in the event of sickness or incapacity of the men or cessation of business by the employer, were considered valid and unobjectionable.[5]

But, in Massachusetts, a contract made by an adult with a citizen of the United States to serve him, "his executors and assigns," for five years, without fixing the nature and extent of the services, or the place of their performance, in consideration of ten dollars, and of being fed, clothed, and lodged, and at the expiration of the contract being paid "the customary freedom dues," is pronounced illegal and void, even if valid where made.[6] "Such a contract, it is scarcely necessary to say, is against the policy of our institutions and laws," was the language of the court.

Lange *v.* Werk, 2 Ohio, N. S. 520; Lawrence *v.* Kidder, 10 Barb. 641; Gilman *v.* Dwight, 13 Gray, 356; Duffey *v.* Shockey, 11 Ind. 71.

[1] 1 Smith Lead. Cas. 521.

[2] Kemble *v.* Kean, 6 Sim. 335.

[3] *Ib.*; Benwell *v.* Inns, 24 Beav. 307. And see Smith Mast. & Serv. 51 *et seq.*; Mallan *v.* May, 11 M. & W. 653; Mumford *v.* Gething, 7 C. B. N. S. 305.

[4] See Wallis *v.* Day, 2 M. & W. 277; 1 Smith Lead. Cas. 521.

[5] Pilkington *v.* Scott, 15 M. & W. 657; Hartley *v.* Cummings, 5 C. B. 247. See 1 Smith Lead. Cas. 521.

[6] Parsons *v.* Trask, 7 Gray, 473. And see Mary Clark's Case, 1 Blackf. (Ind.) 122.

§ 461. **Creating the Relation of Service; Quasi Servants.** — As a general rule, every person of full age, free from all other incompatible engagements, may become either a master or a servant; and the service need not be performed under a legally binding contract, for the service may be constituted *de facto*.[1] The usual law of contracts applies to all who enter the relation. Thus an offer to employ another does not bind the person making it until he is given to understand that it is accepted; and there must appear, as to adults at least, a voluntary coincidence in a common understanding, whether by writings or parol.[2] And arrangements for remunerating a servant by a portion of the profits may, under some circumstances, constitute him a partner rather than a mere servant.[3]

The relation of master and servant is created, so far as may affect the rights of third persons, when one suffers another to proceed in a service in which the latter engaged only as a volunteer.[4] Yet one cannot by merely rendering services voluntarily, without request or assent, compel the other to become his debtor.[5]

A municipal or other corporation may sustain the *quasi* relation of master and servant with those in its employ, so as to be liable for the negligence of the person employed.[6] Such a relation between railroad companies and those in their employ is constantly recognized in the courts. The two terms "master and servant" and "principal and agent," are, in fact, frequently interchanged as though identical in meaning, and, indeed, one is usually quite as inexact as the other.[7]

[1] Smith Mast. & Serv. 1.

[2] McDonald *v.* Boeing, 43 Mich. 394.

[3] Smith Mast. & Serv. 29.

[4] Hill *v.* Morey, 26 Vt. 178.

[5] Webb *v.* Cole, 20 N. H. 490; Alton *v.* Mulledy, 21 Ill. 76.

[6] See Scott *v.* Mayor of Manchester, 37 E. L. & Eq. 495.

[7] In Ohio the distinguishing feature of the relation of service has been said to be that the employer keeps control over the mode and manner of work, and this applies to contractor, agent, or servant; independent contracts, however, not falling within the rule. Cincinnati *v.* Stone, 5 Ohio St. 38. But in Illinois, contractors building a railroad appear to be treated as servants of the company in a more extended sense. Chicago, &c. R. R. Co. *v.* McCarthy, 20 Ill. 385. There is much difficulty in applying the rule as to railroad contractors. See 1 Redf. Railways, 506. In Connecticut, it is said that the manner of paying for work constitutes no criterion, nor the exist-

Where one is neither employed, paid, nor controlled by another, he is not his servant in the legal sense.[1] We have seen that adult children remaining in a family may be *de facto* servants so as to lay the foundation of certain suits.[2]

§ 462. **How Contract for Service is terminated; Causes of Discharge, &c.** — We are now to inquire in what manner the relation of master and servant may be terminated. The causes which justify discharge by the master are various, and the rule depends somewhat upon the nature of the particular employment in question. But most decisions are reducible to three leading classes: *first*, wilful disobedience of a lawful order; *second*, gross moral misconduct; *third*, habitual negligence or kindred fault in the employment.[3]

An instance of the first class came before Lord Ellenborough, where a farmer's servant was ordered to go with the horses a mile off just as dinner was ready, and he said he would not go until he had had his dinner.[4] And another, more recent, is where a farm-servant refused to work during harvest without beer.[5] In a carefully-considered English case, the court went even so far as to justify dismissal of a housemaid who persisted in leaving the house without permission, to visit a sick and dying mother.[6] In these cases, and especially the last, the authority of the master is very

ence of actual present control and supervision on the part of the employer; but that these are both circumstances to be weighed in each case. Corbin *v.* American Mills, 27 Conn. 274.

[1] McGuire *v.* Grant, 1 Dutch 356. See Water Co. *v.* Ware, 16 Wall. 566. One who orally contracts to serve as a farm laborer, comes within the relation of master and servant. Daniel *v.* Swearengen, 6 Rich. 297.

[2] Whether the relation of master and servant actually existed, is the fundamental inquiry in suits where a plaintiff seeks to make one person responsible for the negligence of another; the only true basis of responsibility in such cases being the existence of the master and servant relation, so that one selects and controls the persons employed, directs the execution of the work, and so on. See *post*, c. 4; Robinson *v.* Webb, 11 Bush, 464; Conlin *v.* Charlestown, 15 Rich. 201; Coomes *v.* Houghton, 102 Mass. 211; Railroad *v.* Hanning, 15 Wall. 649; Water Co. *v.* Ware, 16 Wall. 566; 1 Redf. Railw. 3d. ed. 506–509; Ballou *v.* Farnum, 9 Allen, 27; Meara *v.* Holbrook, 20 Ohio St. 137; Palmer *v.* Portsmouth, 43 N. H. 265; Harrison *v.* Collins, 86 Penn. St. 153. See also, as to employment in a colliery, Rourke *v.* Colliery Co., 2 C. P. D. 205.

[3] Smith Mast. & Serv. 70; 2 Kent Com. 259.

[4] Spain *v.* Arnott, 2 Stark. 256.

[5] Lilley *v.* Elwin, 11 Q. B. 742.

[6] Turner *v.* Mason, 14 M. & W. 112. And see Smith Mast. & Serv. 71.

strongly upheld; more so, perhaps, than American policy would concede. Where the misconduct is slight, and a first offence, where the reasons for disobedience are extreme, and where the servant's general conduct is exemplary, this, it seems, ought to go strongly in his own justification; for the mutuality of contracts is always properly considered. An obstinate refusal to do an unlawful act is clearly no ground for dismissal.[1] But for insolence and wilful disobedience of orders a servant may generally be dismissed.[2]

Instances of the second class are not uncommon. Immorality is sufficient cause for dismissal[3]; even the pregnancy of a maid-servant, according to Lord Mansfield.[4] Embezzlement is a good ground, though the sum embezzled be less than the arrears of wages.[5] The same is true of robbery.[6] And of indecent and immoral behavior, especially if exhibited towards others in the master's employ, or otherwise to his immediate detriment.[7] Habitual drunkenness is doubtless a good ground, if it seriously interferes with the due performance of the particular service and the master's interests.[8] Acts and conduct which pointedly indicate fraudulent misbehavior toward the master may, and should, justify prompt dismissal.[9]

The third class furnishes many examples; and yet the rule here is to be laid down with much caution, for a practical application is difficult. Detriment to a master's interests may occur through the servant's fault outside of the strict classification here referred to. There are some English cases where conduct which might ordinarily seem justifiable on a servant's part has been punished by dismissal, the court carrying out the then prevailing policy against teaching the

[1] See Jacquot *v.* Bourra, 7 Dowl. 348.

[2] Beach *v.* Mullin, 5 Vroom, 343.

[3] Atkin *v.* Acton, 4 Car. & P. 208.

[4] Cald. 11; *ib.* 57.

[5] Brown *v.* Croft, 6 Car. & P. 16, *n.*; Spotswood *v.* Barrow, 5 Exch. 110.

[6] Libhart *v.* Wood, 1 W. & S. 265; Trotman *v.* Dunn, 4 Camp. 211; Smith Mast. & Serv. 72.

[7] Weaver *v.* Halsey, 1 Ill. App. 558; Drayton *v.* Reid, 5 Daly, 442.

[8] Gonsolis *v.* Gearhart, 31 Mo. 585; See Lord Denman, in Wise *v.* Wilson, 1 Car. & K. 662.

[9] See Horton *v.* McMurtry, 5 Hurl. & Nor. 667; Singer *v.* McCormick, 4 W. & S. 266. Slandering the master to others, and spitefully suing him on groundless charges, is good cause for dismissal. Brink *v.* Fay, 7 Daly, 562. And see McCormick *v.* Demary, 10 Neb. 515.

secrets of trade to strangers or foreigners.[1] So have many decisions seemed to sustain the master, where the servant lacked in blind devotion to his selfish interests, or asserted a generous independence of opinion a little too boldly.[2] But at the present day, certainly in America, more might be claimed for the servant and less for the master. Yet the legal principle is correct that for habitual negligence or unwarranted absence, or for such conduct as prevents a mutual agreement from being carried out to the reasonable satisfaction of the employer, the person employed may be dismissed; nor would it seem to matter much whether it be through wantonness or palpable inefficiency amounting to a breach of implied undertaking.[3] A servant betraying his master's confidence may, it seems, be discharged.[4] But the relation continues though the master obtains a commitment of the servant to prison.[5] So, where absence is warrantable, or where the absence is temporary for no bad purpose, and the master has suffered no serious loss thereby.[6] Where serious danger, though perhaps not actual damage, is occasioned to the master's business by his servant's conduct, he is justified in dismissing the servant on that account; as if an apothecary's assistant should frequently employ an ignorant shop-boy to make up prescriptions to save himself work.[7] Herein the servant's negligence amounts to a breach of his implied undertaking.

Subject to what has already been said concerning contracts in restraint of trade, we may add that a servant may lawfully be discharged on the ground that he is engaging in another business in competition with and calculated seriously to injure that of his employer. Here the cause of discharge would

[1] Turner *v.* Robinson, 5 B. & Ad. 789.

[2] See Lacy *v.* Osbaldiston, 8 Car. & P. 80; Ridgway *v.* Hungerford Market Co., 3 Ad. & El. 171; Amor *v.* Fearon, 9 Ad. & El. 548.

[3] See Callo *v.* Brouncker, 4 Car. & P. 518, cited Smith Mast. & Serv. 73.

[4] Beeston *v.* Collyer, 2 Car. & P. 609.

[5] Rex *v.* Barton, 2 M. & S. 329.

[6] Filleul *v.* Armstrong, 7 Ad. & El. 557.

[7] Wise *v.* Wilson, 1 Car. & K. 662. Though here the relation was admitted to be not strictly that of servant or apprentice. See further, Harover *v.* Cornelius, 5 C. B. N. S. 236; Stanton *v.* Bell, 2 Hawks, 145.

be serious detriment to the master's interests, if not habitual negligence.[1]

§ 463. **The Same Subject.** — If good ground of discharge exists, and is known to the master at the time of dismissal, it is sufficient to justify the discharge, although he chose to allege some other cause.[2] But it would seem that if the master, at the time he discharged the servant, did not know of any act of misconduct on the servant's part which would justify dismissal, the mere existence of such misconduct would not afterwards avail in his own justification.[3] Discharge for a certain cause should be reasonably soon after knowledge of the cause in order to avail the employer.[4] And a waiver of the right to discharge a servant may be presumed from circumstances.[5]

§ 464. **Termination of Service by Mutual Consent, &c.; Special Terms.** — A contract of service, like all other contracts, may be dissolved by mutual consent, or by the death of either party, or by the completion of the term of service.[6] The parties may make special terms, as, for instance, in fixing a certain period or in requiring a certain previous notice to terminate; and such terms, even if more favorable to one than the other, must be mutually respected.[7]

[1] Adams Express Co. *v.* Trego, 35 Md. 47; *supra*, § 460. It is insufficient excuse to the servant that the competing business was conducted by him without neglecting his master's concerns. Dieringer *v.* Meyer, 42 Wis. 311.

[2] Smith Mast. & Serv. 76, and cases cited; Baillie *v.* Kell, 4 Bing. N. C. 638; Ridgway *v.* Hungerford Market Co., 3 Ad. & El. 171; Mercer *v.* Whall, 5 Q. B. 447.

[3] Cussons *v.* Skinner, 11 M. & W. 161. But see Spotswood *v.* Barrow, 5 Exch. 110.

[4] See Williams *v.* Jeter, 64 Ga. 737; Bast *v.* Byrne, 51 Wis. 531.

[5] Thus, where a servant was to receive payment at a specified rate if he continued temperate and faithful in his employer's service, the fact that he was occasionally intemperate and discontinued service for short periods would not prevent his recovering the stipulated rate for the time actually spent in such service, if he was received back into it, and continued therein without any new arrangement made or any intimation that the old one was terminated. Prentiss *v.* Ledyard, 28 Wis. 131.

[6] See Thomas *v.* Williams, 1 Ad. & El. 685. Contract held to have been dissolved by mutual consent in Stockley *v.* Goodwin, 78 Ill. 127. Accepting one's discharge without remonstrance does not conclude this point. Dana *v.* Short, 81 Id. 468.

[7] Creen *v.* Wright, 1 C. P. D. 591; Walsh *v.* Walley, L. R. 9 Q. B. 367; Preston *v.* American Linen Co., 119 Mass. 400; Naylor *v.* Fall River Co., 118 Mass. 317; Walsh *v.* Walley, L. R.

§ 465. **Servant's Occupation of Master's Premises; No Tenancy Presumed.** — A servant who occupies premises belonging to his master is not presumed to occupy as tenant, but by virtue of the relation of service; and, if such be the case, he acquires no estate therein by the performance of his duties, even though he be also allowed to use the premises for carrying on an independent business of his own.[1] If properly dismissed from the service, therefore, he has no right to remain until ejected upon notice as a tenant; but the termination of his service is likewise the termination of his right to the premises.

CHAPTER II.

MUTUAL OBLIGATIONS OF MASTER AND SERVANT.

§ 466. **Obligations to be considered; as to Master; as to Servant.** — Some obligations arising from the relation of service rest more especially upon the master; others again more especially upon the servant.

§ 467. **Master's Obligation as to Education, Discipline, &c.** — First, as to the master. A moral obligation resting upon every master whose connection with his servant is a very close one, the latter being manifestly on an inferior footing, is to exert a good influence, to regard the servant's mental and spiritual well-being. Positive law enjoins the same duty in a variety of instances with regard to apprentices and workmen under age, by requiring their masters to teach them to

9 Q. B. 367. A servant claiming the benefit of such previous notice can set up no implied immunity from discharge without notice for misconduct. Basse *v.* Allen, 43 Tex. 481. Nor does one abandon the service lawfully where his drunkenness or other misbehavior provoked his master's just resentment. Morgan *v.* Shelton, 28 La. Ann. 822.

One who contracts to labor for a limited period cannot be compelled to stay longer against his consent in order to make up for lost time, or for his employer's personal convenience. Bast *v.* Byrne, 51 Wis. 531; Wyngert *v.* Norton, 4 Mich. 286.

[1] White *v.* Bayley, 10 C. B. N. S. 227; Smith Mast. & Serv. 40, 41.

read, write, and cipher, to see that they attend public worship, and in general, to take due care of their morals.[1]

From such view of a master's obligation comes, doubtless, a rule which some deduce from the old books, that a master has the common-law right to chastise his servant or apprentice moderately; but, on principle, the limitation must be to those servants or apprentices under age, who, by positive law, are committed somewhat as children to their master's keeping.[2] The right is denied as to ordinary servants in this country.[3] "The only civil remedies," says an English writer, "a master has for idleness, disobedience, or other dereliction of duty, or breach of contract on the part of a servant, are either to bring an action against him, or, as Puffendorf expresses it, 'to expel the lazy drone from his family, and leave him to his own beggarly condition.'"[4]

§ 468. **Master's Obligation as to furnishing Necessaries.** — As to necessaries, Kent pronounces the better opinion to be that the master is not bound to provide even a menial servant with medical attendance and medicines during sickness.[5] And so far as special medical attendance furnished an adult servant capable of taking care of himself is concerned, the rule is so settled;[6] though Lord Kenyon, and perhaps Lord Eldon, once thought otherwise.[7] Yet a master is legally bound to provide medicines for his apprentice.[8] One's conduct to the helpless and suffering should not be inhuman. And reference to the authorities will show that, as to domestic servants, courts are not indisposed to infer authority from the master's own conduct.[9] The duty of a master to provide food and other necessaries rests upon contract, express or implied; and it was the English doctrine, as expressed in

[1] See Stats. N. Y., Conn., &c., in 2 Kent Com. 262, and *n*.

[2] See Bac. Abr. tit. Master and Servant (N.); 1 Bl. Com. 428; 2 Kent Com. 260.

[3] Commonweaith *v.* Baird, 1 Ashm. 267; Cooper *v.* State, 8 Baxt. 324.

[4] Smith Mast. & Serv. 69; Puff. Law Nature, b. 6, ch. 3, § 4.

[5] 2 Kent Com. 261.

[6] Smith Mast. & Serv. 118–120; Wennall *v.* Adney, 3 B. & P. 247; Sweetwater Co. *v.* Glover, 29 Ga. 399; Clark *v.* Waterman, 7 Vt. 76.

[7] Scarman *v.* Castell, 1 Esp. 270; Simmons *v.* Wilmott, 3 Esp 93.

[8] Reg. *v.* Smith, 8 Car. & P. 153.

[9] Cooper *v.* Phillips, 4 Car. & P. 581; Sellen *v.* Norman, 4 Car. & P. 80; Friend's Case, Russ. & Ry. C. C. 22.

1802, that neglect to furnish sufficient food, clothing, or lodging to any infant of tender years unable to provide for and take care of himself, whether child, apprentice, or servant, so as thereby to injure his health, was an indictable offence ; which principle a later English statute has extended even further, wherever there is the legal liability to provide necessaries.[1] It may be presumed that, in most cases, the reasonable value of necessaries furnished a servant might be set off against the servant's wages, where the master was not legally bound to supply them.

§ 469. **Master's Obligation as to finding Work.** — How far the master is bound to find work for his servant has sometimes been considered in the courts. The legal principle is that of substantial justice. A master may hire a servant for a certain period, and, paying the wages or salary agreed upon, may keep him in sufficient work or not ; but he cannot deprive the servant of his full compensation through a discontinuance of his own business, or from other like cause.[2] But where the contract of hiring merely contains an undertaking to pay certain stipulated wages in proportion to the work done, there is no implied obligation on the master's part to find work; though the disposition is to construe contracts of doubtful significance into an agreement on the master's part to enable the servant to earn regular and reasonable wages.[3]

§ 470. **Master's Obligation to indemnify Servant.** — It is the duty of every master to indemnify his servant from the consequences of lawful acts, done in pursuance of orders which the servant was bound to obey. And as to an act not *malum in se*, but which might have been either lawful or unlawful, and which the servant was induced by the conduct of his master to believe to be lawful, the rule of indemnity likewise applies.[4] But it would appear that for an act *malum in se*, or

[1] 14 & 15 Vict. c. 11. As to indicting the husband rather than the wife, see Rex *v.* Saunders, 7 Car. & P. 277. See Smith Mast. & Serv. 117.

[2] Aspdin *v.* Austin, 5 Q. B. 671; Elderton *v.* Emmens, 6 C. B. 160; Smith Mast. & Serv. 49, 50.

[3] See Pilkington *v.* Scott, 15 M. & W. 657 ; Hartley *v.* Cummings, 5 C. B. 247; Smith Mast. & Serv. 48, 50; Sykes *v.* Dixon, 9 Ad. & El. 693.

[4] Collins *v.* Evans, 5 Q B. 830; Rawlings *v.* Bell, 1 C. B. 951 ; Cro. Jac. 468; Story Agency, § 339; Smith Mast. & Serv. 121.

which the servant knew to be unlawful, although done by him in obedience to his master's orders, the master is not bound to indemnify his servant; for the servant should have refused obedience.[1]

§ 471. **Master's Obligation to receive into Service the Person engaged; Remedies for Breach.** — It is likewise the duty of the master to receive into his service a person already engaged, and if he fails to do so, he is liable in damages. And yet here a legally binding contract would have to be shown by the plaintiff.[2] Nor will courts of chancery grant injunction to compel specific performance, except perhaps in cases where the relation exists only by remote analogy and the connection between master and servant is not close; the remedy must otherwise be left to the common-law courts.[3] "Consider," said Lord Chancellor Truro, "what the effect would be; how is it possible for an employer or an agent to go on in the intimate connection which such a contract is calculated to create?"[4] So, too, has injunction been lately refused to enforce a contract of apprenticeship, as a proceeding without precedent.[5] Where the contract was for future employment, and the employer repudiates without justification when the time comes, thereby refusing to receive the other party into his service, the remedy under modern practice is, not an action for wages, but to recover damages as for breach of the contract.[6]

§ 472. **Obligation to pay Wages; Servant's Right to recover.** — The servant's right to compensation follows from the fact that the parties have fairly entered into the relation of employer and employed with the reciprocal rights and duties of that relation;[7] and it should be presumed, where no *quasi* parental relation existed, that such labor was to be in some way remunerated, and this most naturally by money wages.[8]

[1] Smith, *ib.* See *post*, c. 3, as to servant's own liability in this respect.

[2] Bracegirdle *v.* Heald, 1 B. & Ald. 722; Blogg *v.* Kent, 6 Bing. 614.

[3] Stocker *v.* Brockelbank, 20 L. J. Ch. N. S. 408. See Willis *v.* Childe, 13 Beav. 117.

[4] Stocker *v.* Brockelbank, *ib.*

[5] Webb *v.* England, 29 Beav. 44.

[6] Howard *v.* Daly, 61 N. Y. 362. The person hired should seek out a new service, so as to reduce the damages. *Ib.*

[7] McDonald *v.* Boeing, 43 Mich. 394.

[8] Moreland *v.* Davidson, 71 Penn. St. 371; Hay *v.* Walker, 65 Mo. 17; Jordan *v.* Foxworth, 48 Miss. 607.

The question whether the person who sues for his wages did his duty, or, if discharged, was discharged without fault, is for the jury to decide upon all the facts.[1]

Where the servant has been wrongfully discharged from his master's employ, two remedies, both at common law, are open to him: one, to treat the contract as a continuing one, and sue in damages for breach thereof; the other to consider it as rescinded, and sue his master on a *quantum meruit* for the services he has actually rendered.[2] Formerly it was thought that he had a third remedy, namely, to wait till the termination of the period of service, and then sue for his whole wages in assumpsit, relying on the doctrine of constructive service;[3] but according to the best authorities, this course cannot now be adopted; for the discharged servant is bound to make the best use of his time and seek out new employment.[4] The first is the remedy usually adopted. To sustain this action, the servant must have been ready and willing to serve; but he need not offer to do so. The amount of damages which he should recover must depend upon the nature of the contract and the wages agreed upon; the jury may exercise a large discretion; and, where no specific wages have been agreed upon, the measure is fixed by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before another situation could be obtained.[5] The second form of action treats the contract of

[1] Echols *v.* Fleming, 58 Ga. 156.

[2] Lilley *v.* Elwin, 11 Q. B. 755; Planche *v.* Colburn, 8 Bing. 14; Colburn *v.* Woodworth, 31 Barb. 381.

[3] Gandall *v.* Pontigny, 1 Stark. 157; Collins *v.* Price, 5 Bing. 132; 2 Smith Lead. Cas. 17, *n.* to Cutter *v.* Powell.

[4] Smith Mast. & Serv. 94, *n.*, and cases cited; Fewings *v.* Tisdal, 1 Exch. 295; Beckham *v.* Drake, 2 Ho. Lords Cas. 606; Sherman *v.* Champlain Trans. Co., 31 Vt. 162; Goodman *v.* Pocock, 15 Q. B. 576; Chamberlin *v.* Morgan, 68 Penn. St. 168; Perry *v.* Simpson, &c. Co., 37 Conn. 520; Howard *v.* Daly, 61 N. Y. 362.

[5] See Beckham *v.* Drake, 2 Ho. Lords Cas. 606; Fewings *v.* Tisdal, 1 Exch. 295; Smith *v.* Thompson, 8 C. B. 44; Given *v.* Charron, 15 Md. 502; Nations *v.* Cudd, 22 Tex. 550; Sherman *v.* Champlain Trans. Co., 31 Vt. 162. In case of unwarrantable discharge, the servant's damages are *prima facie* the amount of wages for the full term. De Leon *v.* Echeverria, 45 N. Y. Super. 610. But if employed meantime in a new place, this reduces the damages, so far as may be reasonable. Ansley *v.* Jordan, 61 Ga. 482. See further, as to proof, Howard *v.* Chamberlin, 64 Ga. 684; Bast *v.* Byrne, 51 Wis. 531; Richardson *v.* McGoldrick, 43 Mich. 476.

service and hiring as rescinded; and the ground on which the servant sues is one applicable to contracts in general; namely, that when one party to a contract has absolutely refused to perform something essential on his side of the contract, the other party is at liberty to terminate it, and sue for services rendered under a *quantum meruit*.[1] Where this remedy is elected the servant can only recover wages for the period during which he actually served.[2] But while the servant may elect either of the two remedies, he cannot pursue them together; and if he sues on both counts in his action he must take the verdict upon one only.[3]

§ 473. **The Same Subject; Rules for Payment of Wages; Offsets; Preference; Apportionment, &c.** — Wages are due in general for work performed; and although the amount of wages was left to the master, a reasonable remuneration must be given.[4] Unless the servant was absolutely worthless, he should have at least what his services were worth, even though negligent and unskilful.[5] The rule is, that a servant discharged for good reason is entitled to wages up to the time of discharge, subject to rules of apportionment to be presently considered, and the special terms of a contract; and to no more. But the mere existence of a valid contract of hiring and service does not necessarily imply a contract to pay wages; for board, lodging, clothes, or the opportunity of learning business, might be a sufficient compensation; particularly in case of the young.[6] So any employer has a right to judge for him-

[1] 2 Smith Lead. Cas. 17, *n.* to Cutter *v.* Powell, and authorities cited; Smith Mast. & Serv. 99. See Goodman *v.* Pocock, 15 Q. B. 576.

[2] Fewings *v.* Tisdal, 1 Exch. 295; Weed *v.* Burt, 78 N. Y. 191; Boyle *v.* Parker, 46 Vt. 343. For services rendered under a special contract which has been wrongfully terminated, or its full performance prevented by the master's fault, the servant may recover as upon an implied *quantum meruit*. Ralston *v.* Kohl, 30 Ohio St. 92; Dobbins *v.* Higgins, 78 Ill. 440; Barr *v.* Van Duyn, 45 Iowa, 228. But cf. Provost *v.* Carlin, 28 La. Ann. 595. The father may be entitled to sue where putting his young son to work. Harris *v.* Separks, 71 N. C. 372; *supra*, Part III. c. 3.

[3] Goodman *v.* Pocock, 15 Q. B. 576; Colburn *v.* Woodworth, 31 Barb. 381.

[4] Bryant *v.* Flight, 5 M. & W. 114; Peacock *v.* Peacock, 2 Camp. 45; Lawson *v.* Perry, Wright, 242. But see Taylor *v.* Brewer, 1 M. & S. 290. See Goodman *v.* Pocock, 15 Q. B. 576; Costigan *v.* Mohawk R. R. Co., 2 Denio, 609.

[5] McCormick *v.* Ketchum, 48 Wis. 643.

[6] Smith Mast. & Serv. 100, *n.*; Rex

self how he will carry on his own business ; and workmen, having knowledge of the circumstances, must judge for themselves whether they will enter his service.[1]

The master is not bound to pay increased wages for increased labor, unless he has contracted to do so.[2] Special terms must be respected, and one who has received for his services all that was *bona fide* agreed upon, can recover no more, although the services may have been worth more.[3] Nor is there any new implied contract to pay wages on simple dissolution of a special contract.[4] The action for wages should, of course, be brought, not against a third party, but against the person by or for whom the plaintiff was hired ; and to ascertain this is not always easy.[5]

The master cannot set off, against the servant's claim for wages, money paid by him to his own medical attendant, unless the servant so stipulated.[6] Nor a gratuity or present to the servant outside the contract of employment.[7] Nor, in an action for an infant's wages, money advanced for articles not necessaries ; or coach fare for her mother.[8] Nor, as it is held, can he set off, against wages, a claim for articles lost or broken by carelessness ; he should sue in a cross-action.[9] But, in an action of compensation for services, the employer may show, by way of recoupment of damages, loss sustained through the breach of the person employed,[10] and in modern practice this right to recoup damages is liberally applied.

v. Shinfield, 14 East, 541 ; Davies *v.* Davies, 9 Car. & P. 87 ; Maltby *v.* Harwood, 12 Barb. 473 ; Meredith *v.* Crawford, 34 Ind. 399 ; Ansley *v.* Jordan, 61 Ga. 482.

[1] Hayden *v.* Smithville, &c. Co., 29 Conn. 548.

[2] Bell *v.* Drummond, Peake, 45.

[3] Bradbury *v.* Helms, 92 Ill. 35.

[4] Lamburn *v.* Cruden, 2 Man. & Gr. 253.

[5] See Smith Mast. & Serv. 104, 105, and cases cited ; Perry *v.* Bailey, 12 Kan. 539 ; Compton *v.* Payne, 69 Ill. 354. Where a servant continues in his master's employment many years, an account being kept up without full settlement, the statute of limitations is not construed to apply. Smith *v.* Velie, 60 N. Y. 106.

[6] Sellen *v.* Norman, 4 Car. & P. 80.

[7] Neal *v.* Gilmore, 79 Penn. St. 421. Perquisites may have entered into the contract of hiring by way of lessening the wages. Bennett *v.* Stacy, 48 Vt. 163.

[8] Hedgeley *v.* Holt, 4 Car. & P. 104.

[9] Le Loir *v.* Bristow, 4 Camp. 134.

[10] Still *v.* Hall, 20 Wend. 51 ; Pixler *v.* Nichols, 8 Iowa, 106 ; Hunter *v.* Litterer, 1 Baxt. 168 ; Blodgett *v.* Berlin Mills, 52 N. H. 215 ; English *v.* Wilson, 34 Ala. 201. See, as to an infant, Meeker *v.* Hurd, 31 Vt. 639. And see Stoddard *v.* Treadwell, 26 Cal. 294.

Modern bankruptcy acts frequently provide that servants or clerks shall be preferred to general creditors in the distribution of assets.[1] It would appear that the bankruptcy of the master does not, *per se*, dissolve a contract of hiring; yet the assignees cannot let out personal services for him.[2]

The death of the master discharges his servant; and, according to the strict rule of law, it would appear that where the contract is entire for a year's service, and neither custom nor statute intervenes, the death of the master in the middle of the year utterly deprives the servant of compensation for the broken period.[3] A contract of apprenticeship, in so far as it was a personal contract, is also terminated by the master's death.[4] But the rule of apportionment is now so much favored that it is apprehended to be unlikely that a construction so inequitable would in this day be permitted to apply to contracts which left the intention of the parties in doubt on this point. And custom is applicable, in the case of domestic servants at least, so as to give them wages for the whole time served, though they do not continue in service for a year.[5] The executors or administrators of the master are the persons to whom a servant must look for such arrears; not an intermeddler with the estate, nor kindred.[6] In some States, wages of domestic servants and laborers are made preferred debts; independently of statute, it is not probable that they are so entitled.[7] Legacies, if actually bequeathed to servants, are sometimes held to extinguish claims against the master's estate for wages.[8] On legal principle, moreover,

[1] See 12 & 13 Vict. c. 106; United States bankruptcy act, March 2, 1867, § 27 (since repealed).

[2] See Thomas *v.* Williams, 1 Ad. & El. 685; Williams *v.* Chambers, 10 Q. B. 337.

[3] 1 Wms. Ex'rs, 644; Smith Mast. & Serv. 111. But see Jackson *v.* Bridge, 12 Mod. 650.

[4] Bac. Abr. tit. Master & Servant (G.). But statutes are not always to this effect. Phœbe *v.* Jay, 1 Bre. 268.

[5] Cutter *v.* Powell, 6 T. R. 320; Smith Mast. & Serv. 112.

[6] 2 Wms. Ex'rs, 822, *n.*, 3d ed.; Welchman *v.* Sturgis, 13 Q. B. 522.

[7] 2 Wm. Ex'rs, *ib.* But see 2 Bl. Com. 511.

[8] See Booth *v.* Dean, 1 Myl. & K. 560; Smith Mast. & Serv. 343 *et seq.* But when work is rendered in consideration of a future legacy, and the legacy is not left, the servant may sue the estate on a *quantum meruit*. See Nimmo *v.* Walker, 14 La. Ann. 581; Sword *v.* Keith, 31 Mich. 247; Shakespeare *v.* Markham, 17 N. Y. Supr. 311, 322. Or for breach of the agreement. Lee *v.* Carter,

when a servant dies in the middle of the term of his engagement, his representatives can, it seems, claim nothing; but here again might custom apply the rule of apportionment,[1] as local codes sometimes do.[2] So where the servant leaves wrongfully, or is dismissed by his master for rightful cause, the periodical pay-day not having come round, he can claim nothing *pro rata*.[3] Yet, with regard to the common case of a hired servant, though the hiring be in a general way, the understanding is common that the servant shall be entitled to his wages for the time he serves.[4] Unless some such rule could be enforced, the stronger party would be constantly tempted to make dismissal a pretext for refusing to pay to the weaker the little pittance which was justly due. And, again, there are circumstances from which a waiver of forfeiture of the servant's accrued wages will be presumed, even though the service was terminated by reason of the servant's misconduct.[5]

§ 474. **The Same Subject; Change of Contract; Excuse by Act of God; Justifiable Termination, &c.** — The original contract of hiring may be changed without any new express contract of the parties; this change being inferred from the facts, and the master's liability for wages fixed accordingly. Thus, one engaged to work on half time and receive half wages may become actually employed on full time, and so may gain the right to recover full wages.[6] Hence, too, wages may be increased or diminished, upon a new understanding, while the service goes on; or one who comes into a family on the footing of a member without pay at all may subsequently be-

52 Ind. 342. And see *supra*, Part III., c. 5.

[1] Smith Mast. & Serv. 115; Cutter *v.* Powell, 6 T. R. 320.

[2] Dryer *v.* Lewis, 57 Ala. 551.

[3] 2 Smith Lead. Cas. 17, *n.* to Cutter *v.* Powell; Spain *v.* Arnott, 2 Stark. 256; Turner *v.* Robinson, 6 Car. & P. 15; Ridgway *v.* Hungerford Market Co., 3 Ad. & El. 171; Lane *v.* Phillips, 6 Jones (Law), 455; Whitley *v.* Murray, 34 Ala. 155; Marsh *v.* Rulesson, 1 Wend. 514; Beach *v.* Mullin, 5 Vroom. 343.

[4] See remarks in Cutter *v.* Powell, *supra*; Smith Mast. & Serv. 116. And see Kessee *v.* Mayfield, 14 La. Ann. 90; Gates *v.* Davenport, 29 Barb. 160; Massey *v.* Taylor, 5 Cold. 447; Costigan *v.* Mohawk R. R. Co., 2 Denio 609; Byerlee *v.* Mendel, 39 Iowa, 382.

[5] Patnote *v.* Sanders, 41 Vt. 66; Prentiss *v.* Ledyard, 28 Wis. 131.

[6] Edrington *v.* Leach, 34 Tex. 285.

come entitled to wages.[1] And a change of employers having occurred by reason of some change of business, the new employers may render themselves liable for the wages of the person employed; while, on the other hand, the original employer continues liable to the person employed, if the latter receives neither actual or constructive notice that the change has occurred.[2]

Where the performance of a condition is prevented by the act of God, it is excused.[3] And where one performs services under a contract, and is, before the expiration of the full period, disabled by sickness or inevitable accident from completing his contract, he is entitled to recover as upon a *quantum meruit* for the period of such disability.[4] Yet it seems that where illness or other causes renders one permanently incompetent to perform his contract, this is a sufficient cause of dismissal, if the employer choose to so regard it.[5] And if one engages in service, concealing a disability which must have interfered with due performance, he should bear the ill consequences.[6]

Where the agreement provides that either party may terminate it at any time, the servant may quit at any time on his own motion, and recover on the contract for services rendered.[7] But if the servant agrees to work for a given time, with the privilege of leaving if dissatisfied, he cannot recover if he leaves without alleging dissatisfaction, but merely to attend to other business.[8] But if employed for a fixed period and discharged without cause, the servant should be

[1] Generally, where one is hired for a fixed compensation for a specified time and continues afterwards to serve, the presumption is that compensation shall continue at the same rate. But the actual agreement of service controls such questions. Smith *v.* Velie, 60 N. Y. 106. Notification by the master that he will hereafter pay differently may establish a new contract, if the servant goes on with his work. Spicer *v.* Earl, 41 Mich. 191.

[2] Perry *v.* Simpson, &c. Co., 37 Conn. 408.

[3] Cruise Dig. Condition, 41, 43.

[4] Wolfe *v.* Howes, 29 N. Y. 197; Cuckson *v.* Stones, 1 El. & El. 248; Fenton *v.* Clark, 11 Vt. 557; Seaver *v.* Morse, 20 Vt. 620.

[5] See Harmer *v.* Cornelius, 5 C. B. N. S. 236; Cuckson *v.* Stones, *supra*; Seaver *v.* Morse, 20 Vt. 620.

[6] Jennings *v.* Lyons, 39 Wis. 553. As where one's wife engaged to work for a year while pregnant. *Ib.*

[7] Evans *v.* Bennett, 7 Wis. 404.

[8] Monell *v.* Burns, 4 Denio, 121.

compensated for the full unexpired term, under the reservations already noted.[1]

§ 475. **The Same Subject; Termination by Mutual Consent; Special Conditions, &c.** — If the contract, though for a certain period, be terminated by mutual consent, recovery may be had on a *quantum meruit* for the services actually performed, though for nothing more, unless expressly agreed to.[2] And work accepted by the employer, though not done according to the terms of the contract, must be paid for at its fair value, not exceeding the stipulated price.[3] So a person employed on a particular service by the month or year, may have a right to compensation for services rendered on request, out of the range of such employment, even without express contract as to the terms of payment.[4] Conditions precedent, such as submission of work to inspectors, performance according to the estimate of third parties, special stipulations and the like, may enter into such contracts.[5] But all such stipulations call for rational interpretation, and even if the master reserves the right to discharge or disapprove work at discretion, a captious exercise of this right is not to be inferred allowable.[6]

Where the agreement was that the value of labor and services should be applied in payment of land for the purchase of which no written contract had been made out, it was held that an action for the value of the labor and services would not lie.[7] But if I sell land to another, to be paid for in work which he presently performs, and I then refuse to convey, he may recover pay for his work.[8] So it was held where the de-

[1] Chiles *v.* Nail Mill Co. 68 Ill. 123.

[2] Given *v.* Charron, 15 Md. 502; Patnote *v.* Sanders, 41 Vt. 66. As where an employer acts and speaks so as to warrant the servant in supposing he has his consent to leave. Boyle *v.* Parker, 46 Vt. 343.

[3] English *v.* Wilson, 34 Ala. 201; Dermott *v.* Jones, 23 How. (U. S.) 220.

[4] Cincinnati, &c., R. R. Co. *v.* Clarkson, 7 Ind. 595.

[5] See Baason *v.* Baehr, 7 Wis. 516; Butler *v.* Tucker, 24 Wend. 447.

[6] Sloan *v.* Hayden, 110 Mass. 141; Miller *v.* Cuddy, 43 Mich. 273; Alexander *v.* Americus, 61 Ga. 36. Forfeiture of wages in such contracts is not to be favored; but such conditions plainly expressed (as, for instance, unless the servant gives notice) are upheld. Walsh *v.* Walley, L. R. 9 Q. B. 367; Preston *v.* American Linen Co., 119 Mass. 400.

[7] Congdon *v.* Perry, 13 Gray, 3.

[8] Leach *v.* Rogers, 28 Ga. 247.

fendant had contracted to sell the plaintiff a house, which the plaintiff, with the defendant's knowledge and without objection from him, put in repair, and also performed labor in part-payment; and where afterwards he was prevented from completing his contract by the fault of the defendant; that he might recover for both the labor performed and the value of the improvements.[1]

§ 476. **Master's Representations as to Servant's Character; Guaranty as to Character, &c.** — Mr. Starkie observes that the giving a character of a servant is one of the most ordinary communications which a member of society is called on to make, but is a duty of great importance to the interests of the public; and in respect of that duty a party offends grievously against the interests of the community in giving a good character where it is not deserved, or against justice and humanity in either injuriously refusing to give a character, or in designedly misrepresenting one to the detriment of the individual.[2] But in the absence of any specific agreement to that effect there is no legal obligation binding a person, who has retained another as a servant, to give that person any character at all on dismissal; and no action will lie against him for refusing to do so.[3] And the decisions on this subject fully establish the principle that representations of a servant's character, oral or written, are on the footing of privileged communications; and that wilful misrepresentation must appear on the master's part to render him liable; not merely wrong and unfair statements made in good faith and without malicious intent.[4]

But a guaranty for the honesty of a servant is sometimes given for the master's protection; just as an official will furnish his bondsmen, or as some companies guarantee the fidelity of clerks and trustees. In such cases, since the rights of a guaranty are carefully watched, the master must on his

[1] Wright *v.* Haskell, 45 Me. 489.

[2] 1 Stark. Slander, 293.

[3] Smith Mast. & Serv. 222; Carrol *v.* Bird, 3 Esp. 201.

[4] Smith, *ib.* 223–250 and cases cited; Fountain *v.* Boodle, 3 Q. B. 12; Hodgson *v.* Scarlett, 1 B. & Ald. 240; 2 Stark. Slander, 58. And see, as to compelling inspection of letter written concerning a discharged servant, Hill *v.* Campbell, L. R. 10 C. P. 222.

part exercise due caution. Thus, on a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant he chooses to continue him in his employ, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.[1]

§ 477. **Obligations resting specially upon the Servant; Performance of his Engagement.** — Now, as to the servant. Of the mutual liabilities of master and servant, some are to be discussed with more especial reference to the latter than the former. Thus the servant, once engaged by a valid contract to enter his employer's service, cannot refuse or neglect to do so without becoming liable in damages; though whether the master may care to pursue his remedy is another matter.[2] The same be said of one who, without sufficient cause, leaves his employment before the legal termination of the period agreed upon.[3] That the service is unpleasant or the labor severe would not alone justify his departure.[4]

While performing service under his contract the servant is bound to regard the interests of his master. He cannot, it would appear, solicit his master's customers into his own business, so long as his engagement lasts, without rendering himself liable to action; but it is held that he can do so when the service is at an end, and he sets up for himself.[5] He must account to his employer, like all other agents, for money or other goods received in the line of duty, and, except in certain cases, cannot set up the right of a third party in opposition to the employer's interests.[6]

[1] Phillips *v.* Foxall, L. R. 7 Q. B. 666. As to the master's liabilities for the servant's injuries, see *infra*, c. 4.

[2] See Richards *v.* Hayward, 2 Man. & Gr. 574; Smith Mast. & Serv. 64.

[3] Bird *v.* Randall, 3 Burr. 1345; Lees *v.* Whitcomb, 5 Bing. 34.

[4] Angle *v.* Hanna, 22 Ill. 429.

[5] Nichol *v.* Martyn, 2 Esp. 732. Yet we presume that this action would lie, if the servant had availed himself, to his master's injury and his own profit, of certain peculiar facilities derived under the contract of employment, though he waited till the engagement ended before making use of them. See Adams Express Co. *v.* Trego, 35 Md. 47.

[6] See Story Agency, § 217, and *n.*; Dixon *v.* Hamond, 2 B. & Ald. 310;

§ 478. **Servant's Accountability to his Master; Negligence, Unskilfulness, &c.** — So is the servant liable for gross negligence in the care of his master's property entrusted to him; though not for ordinary accidents.[1] Servants are also liable for fraud and misfeasance, as in cases of simple bailment generally. Suits of this sort, strictly applicable to domestic servants, are extremely rare; but there are instances to be found in the old books. Thus it is said that if a man deliver a horse to his servant to go to market, or a bag of money to carry to London, which he neglects to do, the master may have an action of account or detinue against him.[2] An employee or servant is liable in a suit brought by his master to indemnify the latter from the consequences of his negligence or misconduct.[3] And this, too, notwithstanding the concurring negligence of another servant not made a defendant with him.[4] And a person employed to do work requiring skill or involving unusual hazard, and undertaking to do it for suitable compensation in a skilful or careful manner, is bound to so do it; and he is responsible to his employer for injury occasioned the latter by the negligent manner in which he performed the work.[5]

§ 479. **Master and Servant may defend one another.** — The old writers say that the servant may justify a battery in the necessary defence of his master; and the master, as the weight of argument goes, may do the same on his servant's behalf.[6]

§ 480. **Servant a Competent Witness for his Master.** — A mere agent or servant is a competent witness for his principal or master, from public convenience or necessity.[7]

Smith Mast. & Serv. 67, and cases cited; Murray *v.* Mann, 2 Exch. 538; Cheesman *v.* Exall, 6 Exch. 341.

[1] Savage *v.* Walthew, 11 Mod. 135; Bac. Abr. tit. Master & Servant (M), (I); Smith Mast. & Serv. 65.

[2] Bac. Abr. tit. Master & Servant (M).

[3] Green *v.* New River Co., 4 T. R. 589; Pritchard *v.* Hitchcock, 6 Man. & Gr. 165; Smith Mast. & Serv. 66. But see Colburn *v.* Patmore, 1 Cr. M. & R. 73.

[4] Zulkee *v.* Wing, 20 Wis. 408.

[5] Willard *v.* Pinard, 44 Vt. 34; Holmes *v.* Onion, 2 C. B. N. S. 790; Pixler *v.* Nichols, 8 Iowa, 106; English *v.* Wilson, 34 Ala. 201; Parker *v.* Platt, 74 Ill. 430; Page *v.* Wells, 37 Mich. 415. See also Story Bailm. § 432; Schoul. Bailm. 107. But as to an infant servant, see Meeker *v.* Hurd, 31 Vt. 639.

[6] See 2 Kent Com. 261; 1 Bl. Com. 429.

[7] Wainwright *v.* Straw, 15 Vt. 215; Stringfellow *v.* Mariot, 1 Ala. 573; Doe

CHAPTER III.

RIGHTS AND LIABILITIES OF THE SERVANT AS TO THIRD PERSONS.

§ 481. **Servant not personally liable on Contracts; Exceptions.** — As a general rule, servants are not liable personally on contracts entered into by them on behalf of their masters. Such a principle would be inconsistent with the very relation. But like any other agent, a servant may make himself liable, provided he contract on his own and not his master's behalf.[1] Questions of this sort turn upon circumstances; as to whom, for instance, the credit was given. But if there be a wrong or omission of right on the servant's part; if, for instance, he transcends his powers, or acts without authority, like all other agents he becomes personally liable to the person with whom he deals in his master's name.[2] For, in respect to such contract, he is no servant at all, but one rather who wilfully or innocently misrepresents himself as such.

Instances of this principle occur in the every-day transactions of life. A broker who puts his own name to a bill of exchange, without words to imply an agency, renders himself personally liable to a stranger.[3] But the receipt of a servant is the receipt of his master, for money rightfully paid him in the course of business.[4] And a sheriff's deputy is not liable to a judgment creditor for money collected by him under an execution in the creditor's favor.[5]

v. Himelick, 4 Blackf. 494; 1 Greenl. Evid. § 416; 1 Phill. Evid. 10th ed. 507 *et seq.*

[1] Smith Mast. & Serv. 194; Story Agency, § 261; Owen *v.* Gooch, 2 Esp. 567; Thomson *v.* Davenport, 9 B. & C. 88.

[2] Smout *v.* Ilberry, 10 M. & W. 1; Paterson *v.* Gandasequi, 15 East, 62; s. c. 2 Smith Lead. Cas. 358.

[3] Leadbitter *v.* Farrow, 5 M. & S. 345; Jones *v.* Littledale, 6 Ad. & El. 486.

[4] Bamford *v.* Shuttleworth, 11 Ad. & El. 926.

[5] Colvin *v.* Holbrook, 2 N. Y. 126.

The reason of the general rule of exemption is, that the principal or master, not the agent or servant, shall answer for the consequence of the latter's contract. The servant is directly responsible to his master, not then to strangers.[1]

§ 482. **Rule of Servant's Liability for his Torts and Frauds.** — But, as Lord Kenyon has observed, the principle does not apply to cases where there is corruption in the foundation of the contract, or it is bottomed in oppression or immorality.[2] Where money is obtained by means of trespass or tort; where a servant misappropriates a fund entrusted to him to be paid to others; in these and similar cases it has been held that the servant is suable by third persons.[3] If, for instance, a debtor sends by his own servant money which he owes his creditor, and the servant refuses to deliver it, and retains it, an action for the money may be maintained by the creditor against the servant. But it is otherwise if the debtor countermanded his orders and received the money back from the servant.[4]

In cases of tort, the rule is general that all persons concerned in the wrong are chargeable as principals. For a misfeasance, therefore, or positive wrong, which affects the person or property of another, the servant cannot shield himself by the excuse that he acted merely in obedience to his master's orders, or for his master's benefit.[5] It is said that in such a case he is sued, not as a deputy or servant, but as a wrong-doer.[6]

But a distinction is sometimes taken between misfeasance and nonfeasance. For mere negligence or nonfeasance the servant is not liable to a stranger.[7] Thus where a banker is

And see *infra*, § 489, as to the doctrine of agency applicable to the servant's acts on his master's behalf.

[1] See Shearm. & Redf. Negligence, 128; Smith Mast. & Serv. 194 *et seq.*

[2] Miller *v.* Aris, 3 Esp. 232; Smith Mast. & Serv. 204.

[3] Buller *v.* Harrison, Cowp. 565; Tugman *v.* Hopkins, 4 Man. & Gr. 389; Howell *v.* Batt, 5 B. & Ad. 504.

[4] Lewis *v.* Sawyer, 44 Me. 332.

[5] Sands *v.* Child, 3 Lev. 352; Lane *v.* Cotton, 12 Mod. 488; Perkins *v.* Smith, 1 Wils. 328; Smith Mast. & Serv. 213, 214; Richardson *v.* Kimball, 28 Me. 463; Bennett *v.* Ives, 30 Conn. 329; Johnson *v.* Barber, 5 Gilm. 425. See Hill *v.* Caverly, 7 N. H. 215.

[6] See Lane *v.* Cotton, *supra*, per Lord Holt; Hoffman *v.* Gordon, 15 Ohio St. 211.

[7] See Lane *v.* Cotton, *supra*, per Lord Holt.

employed to collect a note, which he puts into the hands of another banker, through whose negligence the debt is lost, the creditor cannot sue the latter banker, though he was the one actually at fault.[1] This same principle is applied in Massachusetts, to protect one servant from the injurious consequences of his own wrongful acts to a fellow-servant whenever such acts amount to nothing more than mere negligence or carelessness.[2] So the servant of a carrier is not generally responsible for the loss of a parcel, to the owner, who should rather look to the master.[3] And a servant who has driven a stray horse from the highway into his master's pasture, for the purpose of preventing it from straying on cultivated land, does not become liable for its conversion by turning it into the highway again by direction of his master.[4]

Perhaps the true principle is to refer all such acts of the servant to the scope of his employment in the particular service of his master. We shall presently examine the doctrine of *respondeat superior* with reference to the master, under which head it is most commonly considered. For as a master is more likely to be pecuniarily responsible than his servant, so do those who would sue for injuries incline most willingly to make the master the defendant in their suits to recover damages.[5]

§ 483. **Torts and Frauds of Public Officers.** — Government is not liable for the torts and frauds of its agents. Nor are public officers in general liable for the misdeeds of their subordinates. Thus the Postmaster-General cannot be sued for the loss of letters in the post-office through the fault of his agents.[6] Public policy furnishes, perhaps, the strongest reason for this doctrine. "As to an action lying against the party really offending," Lord Mansfield, however, observed, "there can

[1] Montgomery Bank *v.* Albany Bank, 7 N. Y. 459.

[2] Albro *v.* Jaquith, 4 Gray, 99. And see Brown *v.* Lent, 20 Vt. 529. But see Phelps *v.* Wait, 30 N. Y. 78.

[3] Williams *v.* Cranstoun, 2 Stark. 82. See Smith Mast. & Serv. 213 *et seq.*

[4] Wilson *v.* McLaughlin, 107 Mass. 587.

[5] See next c.

[6] Whitfield *v.* Lord Le Despencer, Cowp. 765. Nor should he be, since he is but the servant of government, — the common employer of both superior and subordinate officials. See 4 Am. Law Rev. 1–17. And see Schoul. Bailm. 240–242.

be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained." [1] And in several instances have deputy-postmasters been sued in damages for their own torts.[2] So are certain public officers, as sheriffs and others, acting in a purely ministerial capacity, frequently held to answer the consequences of their misconduct.[3] But great latitude is to be allowed to one's official acts performed from a sense of duty as guardian of the public interests, and with honorable motive, even though private individuals may incidentally suffer detriment thereby.

§ 484. **Criminal Accountability of Servant.** — For his unlawful acts knowingly committed in his master's service a servant is generally criminally answerable.[4].

CHAPTER IV.

GENERAL RIGHTS AND LIABILITIES OF THE MASTER.

§ 485. **Leading Division of this Chapter.** — In this chapter we shall discuss, *first*, the general rights, *second*, the general liabilities, of the master as concerns third persons and his servant.

§ 486. **Master's Right of Action for Injuries to Servant.** — *First*, as to his rights. The right of action to the master for personal injuries sustained by his servant is recognized in several instances.[5] This right grows out of the loss of service sustained by the master, and the same principle has been noticed with reference to parents. A service *de facto* is sufficient in all such cases.[6] And it cannot be pleaded in

[1] Cowp. 765. And see Smith Mast. & Serv. 219.

[2] See 5 Burr. 2709, 2711, 2715.

[3] Bac. Abr. tit. Sheriff.

[4] State *v.* Walker, 16 Me. 241.

[5] See Duel *v.* Harding, Stra. 595; Hall *v.* Hollander, 4 B. & C. 660; Hodsoll *v.* Stallebrass, 11 Ad. & El. 301; Dixon *v.* Bell, 1 Stark. 287; Ames *v.* Union Co., 117 Mass. 541.

[6] Smith Mast. & Serv. 83–85, and cases cited; Bac. Abr. tit. Master & Servant (O). The relation of master and apprentice enables such suit to

defence that the acts complained of amounted to felony, and that the person committing them had not been prosecuted. But, under a familiar rule, the master cannot maintain an action for injuries which cause the immediate death of his servant.[1]

§ 487. **Right of Action for Seduction, Enticement, &c., of Servant.** — Again, the action for seduction depends upon the existence of the relationship of master and servant; and the loss of service gives the right of action. This action is usually brought by the parent, or one standing in the stead of a parent; though the legal remedy is not perhaps confined to such persons.[2]

For enticing away or harboring one's servant the common law also gives the right of action against the offending party; and where a person, after notice, continues to employ another man's servant, that other, it is said, may maintain an action against him, although at the time he hired him the second master did not know that he was hiring another man's servant; whence it follows that one who did not entice may yet be liable for harboring.[3] The mere attempt to entice a servant away, no damage following, does not entitle the master to maintain an action.[4] Nor will the action lie after the master has recovered from the servant a stipulated penalty for leaving the service;[5] nor for inducing a servant to leave at the expiration of the time for which he was hired, though he had no previous intention of leaving.[6]

A genuine subsisting contract of service between the servant and his former master should, of course, be shown;[7]

be brought. Here the injury was sustained while the servant was a passenger. Ames *v.* Union R., 117 Mass. 541. See § 457 *supra*, *n.*

[1] Osborn *v.* Gillett, L. R. 8 Ex. 88.

[2] See Parent and Child, *supra;* Noice *v.* Brown, 39 N. J. L. 569; Smith Mast. & Serv. 85 *et seq.*; Addison and other general writers on Torts.

[3] Fawcet *v.* Beavres, 2 Lev. 63; Smith Mast. & Serv. 79; Blake *v.* Lanyon, 6 T. R. 221; Bird *v.* Randall, 3 Burr. 1352; Reg. *v.* Daniel, 6 Mod. 99, 182. And see Lumley *v.* Gye, 2 Ell. & Bl. 216, where the question is fully discussed. But laches may be imputable to the master. Demyer *v.* Souzer, 6 Wend. 436.

[4] Bird *v.* Randall, 3 Burr, 1352. Cf. Haskins *v.* Royster, 70 N. C. 601.

[5] *Ibid.*

[6] Nichol *v.* Martyn, 2 Esp. 734; Boston Glass Manufactory *v.* Binney, 4 Pick. 425.

[7] See Smith Mast. & Serv. 79, and cases cited; Sykes *v.* Dixon, 9 Ad. &

though there may be a binding contract of service merely executory, which one wilfully prevents another from entering upon so as to render himself liable in damages for that offence.[1] Nor can the so-called master, where two, socially equal, occupy a relation of constructive service, rely with certainty upon the force of language to help him through his suit against a stranger. In a late English case, some doubts were expressed whether this remedy was to be extended beyond the case of menial servants and laborers; whether, in fact, the higher classes could claim its benefit at all in matters growing out of their mutual contracts.[2] The general rule of the law is certainly to confine its remedies by action to the contracting parties, and to damages directly and proximately consequent on the part of him who is sued; the case of master and servant being exceptional.[3] The right of action in such cases, founded upon the pure relation of service, is not greatly favored in this country, though it is distinctly recognized.[4] And the enticement of a servant in some States renders one liable to prosecution.[5]

El. 693; Campbell *v.* Cooper, 34 N. H. 49. It is enough that the service is one at will, if subsisting when interrupted.

[1] Walker *v.* Cronin, 107 Mass. 555.

[2] Lumley *v.* Gye, 2 Ell. & Bl. 216. This suit was with reference to the enticement of Wagner, the vocalist, from one theatre to another. The majority of the court (Coleridge, J., dissenting) thought the action would lie, even though the parties were not strictly master and servant. As to one orally contracting to serve as a farm laborer, see Daniel *v.* Swearingen, 6 Rich. 297.

[3] See Coleridge, J., *supra*. And see Ashley *v.* Harrison, 1 Esp. 48.

[4] See Seidmore *v.* Smith, 13 Johns. 322; Peters *v.* Lord, 18 Conn. 337; Salter *v.* Howard, 43 Ga. 601; Burgess *v.* Carpenter, 2 S. C. N. S. 7; Bixby *v.* Dunlap, 56 N. H. 456; Haskins *v.* Royster, 70 N. C. 601; Noice *v.* Brown, 39 N. J. L. 569. In general a *scienter* should appear; but, where the enticement was purely malicious, greater damages may be allowed. Bixby *v.* Dunlap, 56 N. H. 456; Morgan *v.* Smith, 77 N. C. 37. And see, as to measure of damages, Lee *v.* West, 47 Ga. 311.

[5] Bryan *v.* State, 44 Ga. 328; Roseberry *v.* State, 50 Ala. 160. The old rule was that a master deprived of the services of an apprentice or servant by the enticement or harboring of another might sometimes waive the tort, and sue for the wages due from the second master: the maxim being, that the acquisition of the servant was the acquisition of the master; but, as Mr. Smith has observed, this rule applied more strictly during the existence of villenage. See Smith Mast. & Serv. 80, 81. Most of the cases to sustain this principle relate to apprentices in a seafaring way; but it is thought to extend to servants in general. Co. Litt. 117 *a*, *n.*; Smith, *supra*, and cases cited; Lightly *v.* Clouston, 1 Taunt. 112.

The general doctrine which upholds the master's action in all these torts is, that a valid and subsisting service owed to the master has been interrupted, to his injury, by another's wrongful act.

§ 488. **Whether Servant's outside Acquisitions belong to Master, &c.** — What a servant may acquire during the relation of service, entirely without the legitimate consideration of such service, does not belong to the master. This rule must be reasonably and beneficially applied according to circumstances. One may become bound by a contract for hiring, but, if not an absolute slave (and such a class our law does not now recognize), he may generally gain something for himself otherwise if he choose. Thus, if one in the service of another, not employed to invent, make an invention, the patent-right is his, and not his master's.[1] And the same rule applies to salvage money, the result of extraordinary service on his part.[2] And one may, moreover, stipulate that outside certain hours he shall have his own time.[3] But the master shall have the advantage of his servant's contracts as to matters within the scope of the service.[4]

It is held in New Hampshire, that if a servant, having his master's money for a specific purpose, make use of it in performing a service which he, without his master's privity, has undertaken for another, the master cannot, by afterwards adopting the servant's act as his own, charge that other party upon the contract made by him with the servant.[5]

§ 489. **Liability of Master upon Servant's Contracts; Servant's Agency.** — *Second.* As to the master's liabilities. A master is liable for the contract of his servant, made in the course of his employment about his master's business.[6] Supposing

[1] Bloxam *v.* Elsee, 1 Car. & P. 558 But see Smith Mast. & Serv. 82.

[2] Mason *v.* The Blaireau, 2 Cranch, 240.

[3] Wallace *v.* De Young, 98 Ill. 638.

[4] Damon *v.* Osborn, 1 Pick. 481. A servant who finds lost property may assert the legal rights of finder for his own benefit against all but the true owners, notwithstanding the property was found on his master's premises. Hamaker *v.* Blanchard, 90 Penn. St. 377. See 2 Schoul. Pers. Prop. 14–17.

[5] Webb *v.* Cole, 20 N. H. 490. As to a master's right to reserve wages when served with garnishment or trustee process, see Davis *v.* Meredith, 48 Mo. 263.

[6] Helyear *v.* Hawke, 5 Esp. 72.

I have a servant, and that servant is in the habit of purchasing the family supplies, in the course of his usual employment; his contracts for such purchases will bind me. But is that simply because he is my servant? If his usual employment be upon the farm, and I never gave him authority to make purchases, he cannot bind me by going to the store merely because he happens to be my servant. So I can authorize others to purchase family supplies: it may be my wife, or my child, or any friend. In all such cases, then, I am bound, because, as is commonly said, I have constituted another my agent, not strictly because I have a servant. No power, therefore, can be inferred from the relation of master and servant, it is said, by which the latter can bind the former.[1] Mr. Smith states the principle more correctly, when he says that the power which a servant possesses of binding his master by contracts is founded upon, or rather is the basis of, the general law of principal and agent.[2] For in truth, it would seem that the relation of master and servant is the older at the law. However this may be, the rule is properly stated, at the present day, to be that the servant can only bind his master as his agent; and this on the principle, common to both branches of the law, that the act of the servant or agent is, in fact, the act of his master or principal: the maxim being, *Qui facit per alium facit per se*.[3]

The well-known rules of agency need not, then, be set out here at any length. We only observe that the contract of a servant, in order to bind the master, must be within the scope of his authority; that this authority may be expressly conferred, or may be implied from the master's conduct; that subsequent ratification of the servant's acts is as binding as a previous authority; that the authority of a servant is coextensive with his usual employment; and that the scope of his authority is to be measured by the extent of his employment.[4] All these principles the reader will expect to find much more

[1] Moore *v.* Tickle, 3 Dev. 244.

[2] Smith Mast. & Serv. 122. See Bac. Abr. tit. Master & Servant (K).

[3] *Ib.* And see Co. Litt. 52 *a*; Story Agency, §§ 7, 8.

[4] See Story Agency, §§ 74, 75; *ib.* § 239 *et seq.*; Bird *v.* Brown, 4 Exch. 798; Smith Mast & Serv. 123–126; Co. Litt. 207 *a*; Bac. Abr. tit. Authority (B); 2 Kent Com. 612 *et seq.*

fully illustrated in any treatise upon agency than in one which professes to take up simply the law of the domestic relations. There may be servants for a variety of purposes; there may be agents, too, for a variety of purposes; and between servant and agent is as yet no strict line of legal demarcation. In general a master is not considered liable on the contract of his servant, unless the servant, at the time he entered into it, assumed to act as his agent.[1] But this principle is not artificially applied, the question of actual intent prevailing.[2]

Where a servant is employed to transact business, and has no particular orders with reference to the manner in which that business is to be transacted, he is considered as invested with all the authority necessary for transacting the business entrusted to him and which is usually entrusted to agents employed in similar matters. In every case, such authority embraces the appropriate means to accomplish the desired end.[3] Thus, a servant sent, without money, to buy goods, has implied authority to pledge his master's credit.[4] And in numerous instances the master has been considered bound by his servant's warranty, that being usual in effecting certain sales; though not where the warranty is subsequent to the sale and not part of the same transaction;[5] for the rule is general that acts and admissions by the servant out of the course of his employment will not bind the master.[6] If the master intends limiting his responsibility for the servant's acts performed in the usual scope of employment, he should give due notice to those dealing with the servant.[7]

[1] Wilson *v.* Tumman, 6 M. & G. 236; 4 Inst. 317; Walker *v.* Hunter, 2 C. & B. 334.

[2] See Trueman *v.* Loder, 11 Ad. & El. 594, 595; Smith Mast. & Serv. 132.

[3] Story Agency, §§ 60, 85; Smith Mast. & Serv. 128; Cox *v.* Midland Counties R. R. Co., 3 Exch. 278; Howard *v.* Baillie, 2 H. Bl. 618.

[4] Tobin *v.* Crawford, 9 M. & W. 718. And see Weisger *v.* Graham, 3 Bibb, 313.

[5] See Murray *v.* Mann, 2 Exch. 538; Alexander *v.* Gibson, 2 Campb. 555; Helyear *v.* Hawke, 5 Esp. 72; Woodin *v.* Burford, 2 Cr. & M. 391; Saunderson *v.* Bell, 2 Cr. & M. 304; and other cases cited in Smith Mast. & Serv. 129, 130.

[6] Fairlie *v.* Hastings, 10 Ves. 128; Story Agency, § 136; Garth *v.* Howard, 8 Bing. 451.

[7] As where one intends that parties dealing with his clerk or servant in a particular line of transactions should look to the latter alone for payment. Pardridge *v.* La Pries, 84 Ill. 51.

There is an important legal distinction between general agents and special agents, hence comes the rule that wherever a master has held out his servant as his general agent, whether in all kinds of business, or in transacting business of a particular kind, the master, in the absence of contrary notice, will be bound by the servant's act, if within the scope of his usual employment, notwithstanding the servant has acted contrary to his master's orders.[1] This is a principle of frequent application.[2] But where a servant is employed by his master to act for him in a single transaction, he must be regarded as the special agent of his master; and in such case it is incumbent upon every one dealing with him, who wishes to charge his master upon his contracts, to inquire into the extent of his authority; as, should he exceed it, his master will not be bound.[3]

Since the nature of the usual employment of a servant is the measure of his implied authority, it follows that this authority can neither be limited by the private instructions of the master nor controlled by any secret agreement between him and his servant. "If this could be done," says a recent writer, "in what a perilous predicament would the world stand in respect of their dealings with persons who may have secret communications with their principal. There would be an end of all dealing but with the master."[4] But if a third party knows of private agreements or instructions, he cannot, of course, charge the master upon any inconsistent contract; for it enters as an element into his own dealings with that servant.[5]

§ 490. **Master's Civil Liability to Others for Servant's Torts.** — Hitherto we have spoken of the master's liability on his servant's contracts; now we come to his civil liability for the servant's torts. This subject receives at the present day more attention in the courts than any other topic of the so-

[1] Smith Mast. & Serv. 132–135; Story Agency, §§ 126, 127.

[2] See Nickson *v.* Brohan, 10 Mod. 109; Rimell *v.* Sampayo, 1 Car. & P. 255; Jordan *v.* Norton, 4 M. & W. 155.

[3] Smith Mast. & Serv. 137; Ward *v.* Evans, 2 Ld. Raym. 928; Waters *v.* Brogden, 1 Y. & J. 457.

[4] Smith Mast. & Serv. 133; 10 Mod. 110.

[5] Howard *v.* Braithwaite, 1 Ves. & B. 209.

called law of master and servant; perhaps more than all the other topics together; but the illustrations so utterly transcend the relation of domestic service, being borrowed in great part from the analogies of modern business corporations and servants in such employ, that we shall make no effort to follow these doctrines into their minute details. Here we find not only the maxim *qui facit per alium facit per se* cited (so well applied to the law of agency), but that other, more strictly appropriate to the present relation, *respondeat superior*. The universal rule is that whether the act of the servant be of omission or commission, whether his negligence, fraud, deceit, or perhaps even wilful misconduct, occasion the injury, so long as it be done in the course and scope of his employment, his master is responsible in damages to third persons.[1] And it makes no difference that the master did not give special orders; that he did not authorize, or even know, of the servant's act or neglect; for even though he disapproved or forbade it, so long as the act was done in the course of the servant's employment, he is none the less liable.[2]

So far is this doctrine carried that a master is even held liable for an injury occasioned by what might to many minds appear the wanton and violent conduct of his servant in the performance of an act within the scope of his employment.[3] We should say, however, that a proper analysis of the cases where a master is held responsible for his servant's torts, would show either that the servant was negligent within the scope of his employment; or else that he displayed a wanton or reckless purpose to accomplish his master's

[1] Story Agency, § 452; Smith Mast. & Serv. 151, 152; Shearm. & Redf. Negligence, 65.

[2] Smith, *ib.* A principal may be answerable where he has received the benefit of his agent's fraud committed within the scope of authority. Mackay *v.* Commercial Bank, L. R. 5 P. C. 410. Cf. Church *v.* Mansfield, 20 Conn. 284.

[3] Thus, where the conductor of an omnibus, in removing therefrom a passenger whom he deemed to be intoxicated, forcibly dragged him out and threw him upon the ground, so that he was seriously injured, it was held that the proprietor was liable. Seymour *v.* Greenwood, 7 Hurl. & Nor. 355. And for a servant's assault in the performance of the service, the master, though in no manner consenting or aiding, has been held liable. Wade *v.* Thayer, 40 Cal. 578.

employment in a wrongful manner,[1] for if he wilfully gratified his own malice under the pretext of serving his master, he alone should be answerable for his violence.

Whether an act amounts to negligence, misfeasance, and the like, is to be determined in each case by its own circumstances.[2] The injury occasioned may be to person or property.[3]

A master is liable, though the act of the servant was not necessary for the proper performance of his master's orders, or was really contrary thereto; so long as the servant was acting in substantial execution of his master's orders.[4]

[1] See Howe *v.* Newmarch, 12 Allen, 49; Cohen *v.* Dry Dock R., 69 N. Y. 170; Rounds *v.* Delaware R., 64 N. Y. 129, per Andrews, J.

[2] See Crofts *v.* Waterhouse, 3 Bing. 319.

[3] But among the many instances which have been considered as falling within the rule are these: Negligent driving by a servant. Michael *v.* Alestree, 2 Lev. 172; Jones *v.* Hart, 2 Salk. 441. Though not inevitable accident without fault. Holmes *v.* Mather, L. R. 10 Ex. 261. The negligent kindling of a fire. Filliter *v.* Phippard, 11 Q. B. 347. This principle is frequently applied to fires caused by locomotive engines. See Smith Mast. & Serv. 153, *n.* Piling up wood improperly. Harlow *v.* Humiston, 6 Cow. 189. Mismanagement of a boat, whereby another is injured. Page *v.* Defries, 7 Best & S. 137; Huzzey *v.* Field, 2 Cr. M. & R. 432. Fraud committed in the course of the servant's employment, according to some authorities. Story Agency, § 264; Southern *v.* How, Cro. Jac. 471. Mistaken arrest under certain circumstances. Moore *v.* Metropolitan R. R. Co., L. R. 8 Q. B. 36. But see Allen *v.* London, &c. R. R. Co., L. R. 6 Q. B. 65. Infringement of a patent by workmen. Betts *v.* De Vitre, L. R. 3 Ch. 429. Unskilful workmanship. Gilmartin *v.* New York, 55 Barb. 239. If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master. Baldwin *v.* Casella, L. R. 7 Ex. 325. The rule may apply likewise where a servant leaves the bars down, or a gate or door negligently open. See Chapman *v.* New York, &c. R. R. Co., 33 N. Y. 369. Or throws things out of a window carelessly upon a passer-by. Corrigan *v.* Union Sugar Refinery, 98 Mass. 577. And it is to be observed that the master's responsibility is not confined to those who work under his immediate supervision, but extends to all others whom he selects to do any work or superintend any business for him. Rex *v.* Hoseason, 14 East, 605; Laugher *v.* Pointer, 5 B. & C. 554; Wayland *v.* Elkins, 1 Stark. 272. As if he should employ a bailiff, steward, or superintendent. How far this principle might be extended, it is useless to speculate.

Where the injury was the combined carelessness of master and servant, the master ought the more to be held liable. Tuel *v.* Weston, 47 Vt. 634. But unless the master was more than ordinarily careless, and chargeable in fact with gross misconduct, he ought not to be held liable for punitory damages, but only so as to compensate the party injured. Cleghorn *v.* N. Y. Central R., 56 N. Y. 44; Hawes *v.* Knowles, 114 Mass. 518.

[4] Smith Mast. & Serv. 157.

Perhaps this may not readily be understood. But take the common instance of negligent driving; where, we shall suppose, a coachman or driver, injudiciously or recklessly, or even intentionally, but not wantonly, turns or races his horses so as to run down another's carriage.[1] Unless the rule of liability were carried to such an extent, we should find masters constantly escaping the consequences of their servants' behavior.

§ 491. **The Same Subject; Limitations of Rule.** — But a master is not responsible for any act or omission of his servants which is not connected with the business in which they serve him, and does not happen in the course or the scope of their employment.[2] Beyond the scope of his authority, the servant is as much a stranger as any other person. Thus, where a servant is employed only to harrow one field and watch a fire in another, and he undertakes besides to burn a pile of rubbish.[3] So, where one who is authorized to distrain cattle trespassing on his master's land, drives the horses of a neighbor on to the land and then distrains them.[4] Or where one performs a task outside of his ordinary and proper employment, or turns aside from a journey in which he was employed, to take a different one, and thereby commits the injury.[5] The distinction in such cases is not always clear, as their examination will show; but we should hardly expect to see the rule of *respondeat superior* applied where a wrong is done wholly for one's own purpose and in his own concerns, disconnected from the employment of the master in question.[6]

[1] Croft *v.* Alison, 4 B. & Ald. 590; Joel *v.* Morrison, 6 Car. & P. 501; Sleath *v.* Wilson, 9 Car. & P. 607. And see Illidge *v.* Goodwin, 5 Car. & P. 190; McDonald *v.* Snelling, 14 Allen, 290. *Aliter*, as to a runaway horse, where the driver is not careless. Holmes *v.* Mather, L. R. 10 Ex. 261.

[2] Smith Mast. & Serv. 160; Shaw *v.* Reed, 9 W. & S. 72; Harriss *v.* Mabry, 1 Ired. 240; Lowell *v.* Boston & Lowell R. R. Co., 23 Pick. 24; Shearm. & Redf. Negligence, 69; Foster *v.* Essex Bank, 17 Mass. 500; Brown *v.* Purviance, 2 Har. & Gill, 316.

[3] Wilson *v.* Peverly, 2 N. H. 548. And see Oxford *v.* Peter, 28 Ill. 434.

[4] Lyons *v.* Martin, 8 Ad. & El. 512; Goodman *v.* Kennell, 3 Car. & P. 167; Lamb *v.* Lady Palk, 9 Car. & P. 629; M'Kenzie *v.* McLeod, 10 Bing. 385; Oxford *v.* Peter, 28 Ill. 434.

[5] Storey *v.* Ashton, L. R. 4 Q. B. 476; Rayner *v.* Mitchell, 2 C. P. D. 357; Sheridan *v.* Charlick, 4 Daly, 338; Cavanaugh *v.* Dinsmore, 19 N. Y. Supr. 465; Stone *v.* Hills, 45 Conn. 44. See also Schoul. Bailm. 135, for the application of this doctrine to the hirer of a horse.

[6] Stevens *v.* Armstrong, 6 N. Y.

It has been ruled that a servant could have no implied authority to do that which it would not be lawful, under any circumstances, for either him or his employer to do.[1] Nor, on general principles, is the master liable if the person injured was not in the exercise of ordinary care at the time of the injury, and so aided in effect in bringing on his suffering.[2] Many decisions indicate the doctrine that for wilful acts of the servant the master is not responsible; but this exemption usually seems to rest in reality upon the ground that the acts complained of were not done in the course and scope of the servant's employment.[3] To apply these and analogous rules is not easy. After all, the principle of scope of the servant's employment seems best to explain the extent of the master's liability for his tort; and the American cases appear to have brought it to bear, whatever the nature of the injury, and however difficult it might sometimes be found to apply the principle understandingly to a particular state of facts.[4]

§ 492. **Master's Responsibility for Tort to his own Servants; Exception as to Fellow-Servants, &c.** — An exception to the master's responsibility for the tortious acts of his servant is found in the rule, now well settled in England and America, that a master is not in general responsible to his own servant for any injury which the latter may sustain through the negligence or wrongful act of a fellow-servant, unless the master has been negligent in his selection or retention of the servant at fault.[5] The application of this rule is usually to railway companies and other common carriers, not often to

435; Yates *v.* Squires, 19 Iowa, 26; Little Miami R. R. Co. *v.* Wetmore, 19 Ohio St. 110.

[1] Poulton *v.* South-Western R. R. Co., L. R. 2 Q. B. 534. See Russell *v.* Irby, 13 Ala. 131.

[2] Smith Mast. & Serv. 161; Butterfield *v.* Forrester, 11 East, 60; Illinois C. R. R. Co. *v.* Baches, 55 Ill. 379.

[3] See Shearm. & Redf. Negligence, 73; Harris *v.* Nicholas, 5 Munf. 483; Moore *v.* Sanborne, 2 Mich. 519; Wright *v.* Wilcox, 19 Wend. 343.

[4] See further, Shearm. & Redf. Negligence, 72; Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Snyder *v.* Hannibal R., 60 Mo. 413.

[5] Smith Mast. & Serv. 187; Priestley *v.* Fowler, 3 M. & W. 1; Hutchinson *v.* York, &c. R. R. Co., 5 Exch. 343; Farwell *v.* Boston & Worcester R. R. Co., 4 Met. 49; Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. 266; Abram *v.* Reynolds, 5 Hurl. & Nor. 143; Shearm. & Redf. Negligence, 101, and cases cited; Sherman *v.* Rochester R. R. Co., 17 N. Y. 153; Chapman *v.* Erie R., 55 N. Y. 579.

domestic servants; but all who occupy the relation of master and servant come within its scope.[1] The converse of our rule holds good; namely, that the master is responsible for the injury sustained by a servant through the negligence or misconduct of a fellow-servant, as for an injury committed by himself, where he was negligent in selecting the fellow-servant, or in continuing him in employment after that fellow-servant proved incompetent.[2] It might be a question whether the master is not in such cases held responsible, as substantially the party whose negligence caused or contributed to the injury; if so, this principle could be pushed still further.[3]

So it is held on like grounds, irrespective of the question of fellow-servants, that a master is not liable to his servant for any defects in the materials furnished to the latter for use in the master's service, unless he was negligent in providing such materials or in pointing out their defects.[4] Nor for injuries caused his servant by latent defects in the structures of employment where he had appointed suitable in-

[1] See Wilson *v.* Merry, L. R. 1 Sc. App. 326; Felch *v.* Allen, 98 Mass. 572; Durgin *v.* Munson, 9 Allen, 396; Hoben *v.* Burlington, &c. R. R. Co., 20 Iowa, 562.

[2] Weger *v.* Penn. R. R. Co., 55 Penn. St. 460; McMahon *v.* Davidson, 12 Minn. 357. See Chicago, &c. R. R. Co. *v.* Jackson, 55 Ill. 492. Where the injury to an inferior servant was caused by the negligence of a superior servant, placed in some sort of charge by the common master, this rule applies as well as though they were equal and performing the same work. Berea Stone Co. *v.* Kraft, 31 Ohio St. 287; Lehigh Valley Co. *v.* Jones, 86 Penn. St. 432; Howells *v.* Landore Steel Co., L. R. 10 Q. B. 62. In fact a "fellow-servant," within the meaning of the rule of our text, is usually understood to be any one serving the same master, and under his control, whether equal, inferior, or superior to the injured person in his grade or standing. Faulkner *v.* Erie R. R. Co., 49 Barb. 324; Shearm. & Redf Negligence, 115; Feltham *v.* England, L. R. 2 Q. B. 33; Wigmore *v.* Jay, 5 Exch. 354; Shanck *v.* Northern, &c. R. R. Co, 25 Md. 462; Murray *v.* Currie, L. R. 6 C. P. 24; McAndrews *v.* Burns, 39 N. J. L. 117. Where the superior servant's direction was outside his own scope of authority, other considerations apply. Railroad Co. *v.* Fort, 17 Wall. 553. But in some States this rule appears to be relaxed somewhat for the injured servant's benefit. Louisville & Nashville R. R. Co. *v.* Collins, 2 Duv. 114; Little Miami R. R. Co. *v.* Stevens 20 Ohio, 415. But a master who injures his own servant cannot claim immunity as a "fellow-servant," though joining in the work. Ashworth *v.* Stanwix, 3 El. & El. 701; Wilson *v.* Merry, L. R. 1 Sc. App. 326. Of course, the mere fact that two persons are engaged in ministering to the wants of one individual does not make them necessarily fellow-servants.

[3] See Davis *v.* Detroit, &c. R. R. Co., 20 Mich. 105.

[4] Shearm. & Redf. Negligence, 103, and cases cited; Hayden *v.* Smithville, &c., Co., 29 Conn. 548.

spectors who failed to discover and report them, and he received no other information that the defects in fact existed.[1] In short, ordinary care and diligence on his part will protect the master from liability to his own servants; and ordinary care is usually presumed to exist in absence of proof to the contrary.[2] But for his own negligence, on the other hand, a master is liable to his own servant as to any one else; that is to say, provided the servant exercised ordinary care,[3] and not otherwise. Though not a guarantor,[4] it is incumbent upon the master to use ordinary care in selection of servants,[5] and in the procurement of materials, and in keeping the premises of usual employment in repair and safe condition,[6] and in remedying defects which are brought to his notice.[7] But a master does not insure his servant against accidents,[8] nor the result of the servant's own risks or carelessness. Peculiar terms of the employment have a bearing upon such issues.[9]

[1] Warner *v.* Erie R. R. Co., 39 N. Y. 468. But see Chicago, &c. R. R. Co. *v.* Jackson, 55 Ill. 492; Paulmier *v.* Erie R. R. Co., 34 N. J. L. 151. Where the master employs persons who are to furnish each his own tools or appliances, he is not answerable for defects in such tools or appliances. Harkins *v.* Sugar Refinery, 122 Mass. 400.

[2] Shearm. & Redf. 104; Roberts *v.* Smith, 2 Hurl. & Nor. 213; Brydon *v.* Stewart, 2 Macq. H. L. 30; Cayzer *v.* Taylor, 10 Gray, 274; Ashworth *v.* Stanwix, 3 El. & El. 701; Johnson *v.* Bruner, 61 Penn. St. 58.

[3] Chicago R. *v.* Donahue, 75 Ill. 106.

[4] Hough *v.* Texas R., 100 U. S. Supr. 213.

[5] Gilman *v.* Eastern R. R. Co., 10 Allen, 233; Faulkner *v.* Erie R. R. Co., 49 Barb. 324; Moss *v.* Pacific R. R. Co., 49 Mo. 167. The English statement of the rule is that "negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants." Tarrant *v.* Webb, 25 Law J. N. S. C. P. 263. The master cannot delegate his responsibility so as to divest himself of the necessity of using ordinary care. See Fuller *v.* Jewett, 80 N. Y. 46.

[6] Ryan *v.* Fowler, 24 N. Y. 410; Williams *v.* Clough, 3 Hurl. & Nor. 258; Buzzell *v.* Laconia, &c. Co., 48 Me. 113; Allerton Packing Co. *v.* Egan, 86 Ill. 253; Fairbank *v.* Haentzsche, 73 Ill. 236.

[7] Perry *v.* Ricketts, 55 Ill. 234. And this liability for his own negligence would appear to apply in some cases where a fellow-servant contributed to the injury. Paulmier *v.* Erie R. R. Co., 34 N. J. L. 151.

[8] Flynn *v.* Beebe, 98 Mass. 575, per Hoar, J. See also Marshall *v.* Stewart, 2 Macq. Ho. Lords, 30, 33, E. L. & Eq. 1.

[9] Where the servant knows his master's rules and violates them, it is held that he must suffer the consequences; for of the reasonableness of the rule his master must be the sole judge. Wolsey *v.* Lake Shore R., 33 Ohio St. 227. It seems to the present writer, however, that if the servant showed that he exercised ordinary care he ought to recover, though even in the act of transgressing an unreasonable rule of his employer. See dissenting opinions in Wolsey *v.* Lake Shore R., *supra*. As to warning a child or inexperienced

The rule that a master is not responsible to one servant for the negligence of a fellow-servant applies to the case of a person who is injured while voluntarily assisting the servant. A guest, a friend, a relative, any one engaged in the same common work, comes within the principle.[1]

§ 493. **Master not Criminally Responsible for Servant, but only for himself.** — As a general rule, the master is not criminally liable for the acts of his servants, unless he expressly command or personally co-operate in them. Each offender against public justice must answer for himself.[2] Where one, however, procures innocent agents to do acts amounting to a felony, the employer, and not the innocent agent, is held accountable; for this is his own act.[3] As to penalties, the rule in this country is sometimes understood to be the same.[4] Yet, penal actions in general have more the character of civil suits then of criminal proceedings; and, under the revenue laws, penalties are frequently imposed upon the master.[5] So again are masters indicted for public nuisances committed by their servants,[6] according to the English rule. Some of the proceedings authorized by statute against corporations in this country for damages caused by the negligence of their servants will be found to contain a like principle.[7]

person against the dangers of the task committed to him, see Sullivan *v.* India Man. Co., 113 Mass. 396; O'Connor *v.* Adams, 120 Mass. 427; Hill *v.* Gust, 55 Ind. 45.

A servant not apparently unfit for hazardous duties, and accepting such an employment, takes upon himself the natural risks of that service. Howd *v.* Miss. Central R., 50 Miss. 178; Gibson *v.* Erie R. 63 N. Y. 449; Pennsylvania R. *v.* Lynch, 90 Ill. 333. This doctrine is applied to the case of a minor. De Graff *v.* N. Y. Central R., 76 N. Y. 125. *Sed qu.* if the minor was obviously unfit to be employed in such dangerous service.

[1] Degg *v.* Midland R. R. Co., 40 E. L. & Eq. 376; Potter *v.* Faulkner, 1 Best & Smith, 800; Althorf *v.* Wolfe, 22 N. Y. 355; Abraham *v.* Reynolds, 5 Hurl. & Nor. 143; Ohio, &c. R. R. Co. *v.* Hammersley, 28 Ind. 371; Stewart *v.* Harvard College, 12 Allen, 58; Washburn *v.* Nashville, &c. R. R. Co., 3 Head, 638. For the case where a servant, not authorized to do so, gets another to help him in his work, see Jewell *v.* Grand Trunk R., 55 N. H. 84.

[2] Smith Mast. & Serv. 143; Story Agency, § 452; Rex *v.* Huggins, 2 Ld. Raym. 1574; Sloan *v.* State, 8 Ind. 312.

[3] Reg. *v.* Bleasdale, 2 Car. & K. 166.

[4] Deerfield *v.* Delano, 1 Pick. 465; Goodhue *v.* Dix, 2 Gray, 181.

[5] See Smith Mast. & Serv. 145–147; Attorney-General *v.* Siddon, 1 Cr. & J. 220; Atcheson *v.* Everitt, Cowp. 391.

[6] 1 Bl. Com. 431, 432; Turberville *v.* Stampe, 1 Ld. Raym. 264.

[7] For further discussion of the broad principles underlying a master's liability for the negligence of his servants, as illustrated in the modern English

§ 494. **Final Observations on Law of Domestic Servants.** — The foregoing brief statement of doctrines concerning the law of master and servant may suffice for the present treatise in its limited space and scope. To enter upon the law further, or to attempt an analysis of the numerous and conflicting cases which constantly arise at the present day under what might be called the analogies of master and servant, would be at present impossible. We trust in time to see the topic of "master and servant" confined to its legitimate and proper limits, as one of the domestic relations, and some new and more comprehensive title applied to such decisions as clearly affect mankind in the external concerns of life.

and American cases, the reader is referred to such general works as Shearman and Redfield on Negligence; Story or Wharton on Agency, and Wood on Master & Servant. The decisions which relate to domestic service constitute a very small proportion of those which properly belong to this head.

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